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No. 99 451

IN THE SUPREME COURT OF THE UNITED STATES

GAIL LEWIS, Warden, et al., *Petitioners*,

v.

JESUS GARCIA DELGADO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

People v. Wende, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839 (1979) applied *Anders v. California*, 386 U.S. 738 (1967), in which this Court held that appointed criminal appellate counsel seeking to withdraw from a frivolous appeal must file a brief referring to anything in the record that might arguably support the appeal. *Wende* approved no-merit briefs that include a statement of the procedural and historical facts but no specification of frivolous legal issues and held that the state court of appeal must independently review the record in such cases for error. Approximately 1,500 criminal appeals a year are processed under *Wende*. The questions presented are:

1. Is the form of no-merit brief approved in *Wende* contrary to or an unreasonable application of *Anders* under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)?

2. Is a habeas petitioner who claims ineffective assistance of counsel because his appellate counsel filed a *Wende* brief required to show prejudice?

3. Does § 2254(d) mandate deference to a merits denial by a state court that does not articulate reasons for its determination?

LIST OF PARTIES

Gail Lewis, Warden of the Pleasant Valley State Prison in California, et al. are the Petitioners in this federal habeas corpus proceeding.

Respondent is Jesus Garcia Delgado, who was convicted of manufacturing methamphetamine, possession of chemicals with intent to manufacture methamphetamine, possession of methamphetamine for sale, as well as a quantity enhancement, resulting in a term of fifteen years in state prison.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONS, STATUTES OR REGULATIONS	2
STATEMENT OF THE CASE	3
A. Introduction	6
B. The Ninth Court Created A Significant Split Of Authority By Disagreeing With The California Supreme Court And Failing To Apply Properly The Limitations of § 2254(d)(1)	9
C. The Ninth Circuit Failed To Give Adequate Deference To The State Court's Rejection Of Delgado's Claim When The Court Refused To Require Delgado To Establish Prejudice	16
D. The Ninth Circuit's Erroneous Conclusion That A Federal Court's Post-AEDPA Collateral Review Of A State Court Decision Is Not Possible If The State court Failed To Provide Reasons For Its Decision, Thus	

TABLE OF CONTENTS, CONT'D

Requiring An Independent Review, Contributes To The Split Of Authority Among United States Courts Of Appeals On This Important Question Of Federal Law 19

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Anders v. California
386 U.S. 738 (1967) 4-6, 9-12, 14, 15, 19

Brecht v. Abrahamson
507 U.S. 619 (1993) 9

Calderon v. Thompson
523 U.S. 538 (1998) 9

Cardwell v. Greene
152 F.3d 331 (4th Cir. 1998)
cert. denied
___ U.S. ___
119 S. Ct. 587
142 L. Ed. 2d 491 (1998) 21

Chaney v. Lewis
801 F.2d 1191 (9th Cir. 1986) 20

Collazo v. Estelle
940 F.2d 411 (9th Cir. 1991) 20

Com. v. McClendon
495 Pa. 467
434 A.2d 1185 (Pa. 1981) 13

Davis v. Kramer
167 F.3d 494 (9th Cir. 1999) 7

Delgado v. Lewis
168 F.3d 1148 (1999) 20

TABLE OF AUTHORITIES, CONT'D

Derrick v. Peterson
924 F.2d 813 (9th Cir. 1990) 20

Felker v. Turpin
518 U.S. 651 (1996) 9

Hennon v. Cooper
109 F.3d 330 (7th Cir. 1997) 22

Herbert v. Billy
160 F.3d 1131 (6th Cir. 1998) 22

Hollman v. Wilson
158 F.3d 177 (3d Cir. 1998) 22

Ex Parte Dunn
514 So. 2d 1300 (Ala. 1987) 19

In re Marquam Inv. Corp.
942 F.2d 1462 (9th Cir. 1991) 20

Jacobsen v. U.S. Postal Service
993 F.2d 649 (9th Cir. 1992) 20

Johnson v. Fankell
520 U.S. 911 (1997) 8

Johnson v. Jones
515 U.S. 304 (1995) 23

Jones v. Barnes
463 U.S. 745 (1983) 18

TABLE OF AUTHORITIES, CONT'D

Lindh v. Murphy
96 F.3d 856 (7th Cir. 1996)
overruled on other grounds in
521 U.S. 320 (1997) 23

U.S. Ex Rel. Maxwell v. Gilmore
37 F. Supp. 2d 1078 (N.D.Ill. 1999) 22, 23

McCoy v. Court of Appeals of Wisconsin
486 U.S. 429 (1988) 10, 13

McLee v. Angelone
967 F. Supp. 152 (E.D.Va. 1997) 22

McQueary v. Blodgett
924 F.2d 829 (9th Cir. 1991) 20

Moss v. C.I.R.
831 F.2d 833 (9th Cir. 1987) 20

Parker v. Angelone
959 F. Supp. 319 (E.D.Va. 1997) 22

Pennsylvania v. Finley
481 U.S. 551 (1987) 9

Penson v. Ohio
488 U.S. 75 (1988) 10, 12, 13, 15-19

People v. Hackett
36 Cal. App. 4th 1297
43 Cal. Rptr. 2d 219 (1995) 6

TABLE OF AUTHORITIES, CONT'D

People v. Wende
25 Cal. 3d 436
600 P.2d 1071
158 Cal. Rptr. 839 (1979) 3-8, 10-12, 14-16, 18

Perry v. O'Donnell
749 F.2d 1346 (1984) 20

Porter v. Gramley
112 F.3d 1308 (7th Cir. 1997) 23

Public Service Co. of Colorado v. Batt
67 F.3d 234 (9th Cir. 1995) 20

Robbins v. Smith
152 F.3d 1062 (9th Cir. 1997)
cert. granted
119 S. Ct. 1139
143 L. Ed. 2d 207 (1999) 6, 8, 9, 15, 16

Robinson v. Borg
918 F.2d 1387 (9th Cir. 1990) 20

Saridakis v. United Airlines
166 F.3d 1272 (9th Cir. 1999) 20

Sorrell v. Securities and Exchange Com'n
679 F.2d 1323 (9th Cir. 1982) 20

State v. Balfour
814 P.2d 1069 (Or. 1991) 14

TABLE OF AUTHORITIES, CONT'D

State v. Clark
___ Ariz. ___
___ P.2d ___
1999 WL 16739, *1 (Ariz. Ct. App. 1999) 14, 15

Strickland v. Washington
466 U.S. 668 (1984) 7, 16, 19

Teague v. Lane
489 U.S. 288 (1989) 7-9

Tolbert v. Page
182 F.3d 677 (9th Cir. 1999) 20

United States v. Givens
767 F.2d 574 (1985) 20

Weeks v. Angelone
4 F. Supp. 2d 497 (E.D.Va. 1998) 22

Williams v. Taylor
163 F.3d 860 (4th Cir.)
cert. granted
119 S. Ct. 1355 (1999) 7, 9, 11

Wright v. Angelone
151 F.3d 151 (4th Cir. 1998) 22

TABLE OF AUTHORITIES, CONT'D

Constitutional Provisions

United States Constitution
amend. VI 2

Statutes

28 U.S.C.
§ 1254(1) 2
§ 2254 2, 4
§ 2254(a) 2
§ 2254(d) 5, 7, 8, 12, 19, 21, 24
§ 2254(d)(1) 11

Other Authorities

104th Congress, 1st Sess.
141 Cong. Rec. S7841, S7846 (June 7, 1995) 21

1998 Annual Statistical Report of the
Judicial Council of California 6

1999 Annual Statistical Report of the
Judicial Council of California 8

Antiterrorism and Effective Death Penalty Act of 1996
2, 4, 7-9, 11, 20, 21, 24

INDEX TO APPENDICES

APPENDIX A:

Opinion of the Ninth Circuit Court of Appeals Filed June 23, 1999. A-1

APPENDIX B:

Opinion of the Ninth Circuit Court of Appeals Filed February 23, 1999 A-15

APPENDIX C:

Decision of the United States District Court A-29

APPENDIX D:

California Supreme Court Orders Denying Petitions for Review and State Habeas Corpus A-43

APPENDIX E:

California Court of Appeal's Decision Affirming Delgado's Conviction A-45

APPENDIX F:

Ninth Circuit Order Relating to Stay of the Mandate A-48

INDEX TO APPENDICES

APPENDIX G:

No-Merit Brief filed in the California Court of Appeal A-49

IN THE SUPREME COURT OF THE UNITED STATES

No.

GAIL LEWIS, Warden, et al., *Petitioners*,

v.

JESUS GARCIA DELGADO, *Respondent*.

Gail Lewis, et al. (Petitioners), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed the United States District Court, Central District of California's (district court) conditional grant of a writ of habeas corpus vacating the conviction of Respondent Jesus Garcia Delgado (Delgado) unless he is afforded a new state appeal.

OPINION OR JUDGMENT BELOW

Judge Thomas' amended opinion for the United States Court of Appeals for the Ninth Circuit appears at Appendix A to the Petition, and is reported at 181 F.3d 1087 (9th Cir. 1999). The original opinion appears at Appendix B and is reported at 168 F.3d 1148 (9th Cir. 1999). The unreported opinion of the district court appears at Appendix C to the Petition. The California Supreme Court's denial orders appear at Appendix D. The California Court of Appeal's unreported affirmance of Delgado's conviction can be found at Appendix E.

STATEMENT OF JURISDICTION

The United States Court of Appeals issued an amended Opinion on June 23, 1999, and denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc that same day. This Petition for Writ of Certiorari follows within ninety days. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONS, STATUTES OR REGULATIONS

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

Section 2254 as amended by the AEDPA provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – [¶] (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

> States; or [¶] (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

In 1995, Delgado was convicted and sentenced to state prison after he pled guilty to manufacturing methamphetamine, possession of chemicals with intent to manufacture methamphetamine, and possession of methamphetamine for sale, and admitted a quantity enhancement. Pursuant to the plea agreement, Delgado agreed to a maximum of fifteen years in state prison. The trial court imposed a fifteen year term.

On direct appeal, Delgado's attorney filed a brief pursuant to *People v. Wende*, 25 Cal. 3d 436, 600 P.2d 1071, 158 Cal. Rptr. 839, and Delgado filed a supplemental brief. The California Court of Appeal independently reviewed the record, considered the claims in Delgado's supplemental brief, and affirmed the judgment, concluding there were no arguable issues. Appendices E and G. The California Supreme Court summarily denied review. App. D.

In May 1996, Delgado filed a Petition for Writ of Habeas Corpus in the California Supreme Court, claiming ineffective assistance of trial and appellate counsel. Delgado alleged that when he signed the plea agreement, a defense investigator promised him he would receive credit for time served rather than fifteen years in prison, and no one spoke on Delgado's behalf at the sentencing hearing. Delgado also argued appellate counsel failed to raise these issues and failed to provide Delgado with the appellate record. The California Supreme Court summarily denied the Petition in August 1996. App. D.

In October 1996, Delgado filed a Petition for Writ of Habeas Corpus in the district court pursuant to 28 U.S.C. § 2254. The Petition alleged Delgado's constitutional rights were violated on direct appeal. Specifically, Delgado alleged his appellate counsel had been ineffective, because he "only" filed a *Wende* brief and failed to raise the issues Delgado desired to be raised, and failed to provide Delgado with the appellate record.

In June 1997, the district court concluded that Delgado was entitled to relief on the claim of ineffective assistance of appellate counsel. The court conditionally granted Delgado's Petition for Writ of Habeas Corpus on the ground that appellate counsel was ineffective for failing to meet the standards of *Anders v. California*, 386 U.S. 738 and ordered Delgado discharged from custody unless the California Court of Appeal accepted jurisdiction over Delgado's direct appeal and appointed counsel within sixty days. App. C.

Petitioners appealed to the United States Court of Appeals for the Ninth Circuit. Pursuant to the district court's Order, the California Court of Appeal took jurisdiction and appointed counsel, reinstating the state court direct appeal. Petitioners obtained a stay of those proceedings from the California Court of Appeal, pending the Ninth Circuit proceedings.

On February 23, 1999, the Ninth Circuit issued a unanimous published opinion, affirming the judgment based on the ineffective assistance of appellate counsel. The court found: (1) Delgado exhausted his state remedies; (2) the California Supreme Court's summary denial required no deference under AEDPA, because the California Supreme Court failed to provide any reasons for its conclusions; (3) appellate counsel was constitutionally deficient for failing to raise any arguable issues on direct appeal (a finding that California's *Wende* procedure is constitutionally deficient); and (4) prejudice

is presumed from appellate counsel's failure to raise any arguable issues on appeal. App. B.

Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc on March 8, 1999. Petitioners argued the panel incorrectly held a state court summary denial is not entitled to deference under § 2254(d), and also argued the panel incorrectly held that California's *Wende* procedure fails to comport with *Anders*.

On June 23, 1999, the Ninth Circuit withdrew its Opinion and issued an amended Opinion. The Opinion did not deviate from the original Opinion's language regarding the *Wende/Anders* issue, nor the conclusion that prejudice is presumed from appellate counsel's deficiency. The Ninth Circuit amended the original Opinion by deleting the assertion that de novo review is required when a state court fails to provide reasons for its decision. However, the amended Opinion still maintains that under § 2254(d), a federal court cannot review a state court's application of clearly established federal law in the absence of a reasoned opinion, and, thus, an independent review of the record is required. The Ninth Circuit added footnoted material that asserts an independent review of the record is not the equivalent of de novo review. The Ninth Circuit also relegated to a footnote its assertion in the original Opinion that less deference to state court decisions is sometimes appropriate.

The Ninth Circuit denied Petitioners' Petition for Rehearing and rejected the Suggestion for Rehearing En Banc in light of the amended Opinion. Petitioners filed a Motion to Stay the Mandate pending the filing of this Petition for Writ of Certiorari. On July 12, 1999, the Ninth Circuit granted a stay of the mandate until August 16, 1999. Apps. A and F.

E. Introduction

The Ninth Circuit's Opinion invalidates California's nearly twenty-year-old procedure (the *Wende* procedure) for handling the more than 1,500[1] no-merit indigent criminal appeals that are filed annually. In *Wende*, the California Supreme Court held the *Wende* procedure comports with *Anders*. Thus, the Ninth Circuit Opinion in this case disagrees with the California Supreme Court on an important question of federal law. The Opinion engenders uncertainty about how to process pending appeals, and places the validity of the state's appellate process in doubt by inviting a parade of habeas petitions claiming that the state still has not adequately complied with *Anders*, as interpreted by the Ninth Circuit.[2]

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1. In fiscal year 1996-1997, counsel filed 7,774 opening briefs in criminal and juvenile appeals. 1998 Annual Statistical Report of the Judicial Council of California. Assuming that the previously identified percentages of no-merit briefs from two of the state's six appellate districts (20 percent and 24 percent, *People v. Hackett*, 36 Cal. App. 4th 1297, 1304 n.4, 43 Cal. Rptr. 2d 219, 224 n.4 (1995)) are representative and relatively constant, statewide more than 1,500 no-merit briefs were filed that fiscal year.

2. This Court has granted the state's Petition for Writ of Certiorari in *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1997), *cert. granted*, 119 S. Ct. 1139, 143 L. Ed. 2d 207 (1999), on the following questions: (1) whether the Ninth Circuit erred in finding California's no-merit brief procedure violated the Sixth Amendment right to the effective assistance of counsel under *Anders*; (2) whether the Ninth Circuit erred in ruling the *Anders* violation required a new appeal, without a showing of error under

The Opinion further concludes that if appellate counsel files a *Wende* brief, presumed prejudice results. The Ninth Circuit Opinion creates the potential for significant disruption in the state's appellate courts by announcing a rule that will require new appeals for defendants whose convictions are final.

The Ninth Circuit also interprets § 2254(d) differently from other United States Courts of Appeals.[3] The California Court of Appeal and California Supreme Court summarily denied Delgado's claims for relief. On federal habeas review, the district court conducted de novo review of the state court summary denials. The Ninth Circuit then held when a state court fails to provide any reasons for its decision, a federal court cannot review the state court's application of federal law. Thus, the federal court must conduct an independent review of the record. An independent review is the equivalent of de novo review, and thus is violative of § 2254(d)'s requirement of deference to state court decisions. The question of whether a state court summary denial requires deference or an independent review of the record arises

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Strickland v. Washington, 466 U.S. 668 (1984); and (3) whether the Ninth Circuit violated the rule announced in *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit reiterated its invalidation of California's *Wende* procedure in the post-AEDPA case *Davis v. Kramer*, 167 F.3d 494 (9th Cir. 1999), pet. for cert. filed, March 9, 1999, No. 98-1427.

3. The meaning of the terms "contrary to" and "unreasonable application of" from § 2254(d) is currently pending before this Court in *Williams v. Taylor*, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1355 (1999), No. 98-8384, as is the relation between the rule announced in *Teague v. Lane*, 489 U.S. 288 and the AEDPA.

in every post-AEDPA federal habeas corpus case that involves a summary denial. As the number of petitions for review and habeas corpus relief filed in state supreme courts are considerable, and summary denials are commonplace, the issue will recur.[4] California faces a difficult choice following this decision: it can radically restructure its entire judicial system, by ceasing to issue summary denials, or it can forego deference on collateral review. This Court has expressed its disinclination to require state courts "to undertake something as fundamental as restructuring the operation of its courts." *Johnson v. Fankell*, 520 U.S. 911, 922, 922 n.13 (1997). With complete disregard for the very essence of the AEDPA -- deference to final state court decisions -- the Ninth Circuit has essentially insisted that the nation's most populous state should change its judicial processes, from the lower courts to the state's highest court. The Ninth Circuit opinion contributes further to the significant split of authority on the issue of what "deference" federal courts must accord state court summary denials on collateral review. The Ninth Circuit added an element which does not appear in § 2254(d), in that it requires a state court to provide reasons for denying claims, or the state court must forego deference to its decision.

This Court will consider in *Robbins* whether the Ninth Circuit violated *Teague* in invalidating California's *Wende* procedure. This Court will also consider in

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4. For example, 2,152 petitions for writ of habeas corpus were filed in the California Supreme Court during fiscal year 1997-1998. A total of 3,716 criminal petitions for review were filed in the California Supreme Court during that same fiscal year. A mere 3% were granted, granted and held, or granted and transferred. 1999 Annual Statistical Report of the Judicial Council of California, Tables 3 and 5.

Williams v. Taylor, whether § 2254(d) merely codified *Teague*, or went beyond *Teague*, requiring expanded protections for final state court decisions. If this Court concludes in *Robbins* the Ninth Circuit violated the rule in *Teague*, then certainly the Ninth Circuit violated the mandates of § 2254(d) in this case, as § 2254(d) limits federal collateral review of state court decisions at least as much as *Teague*. However, the Ninth Circuit's erroneous interpretation of § 2254(d)'s standard of review in this case renders it far more likely that state court decisions will be overturned on federal collateral review than prior to enactment of the AEDPA.

This Court has consistently recognized the significant societal costs associated with federal habeas corpus review. *Brecht v. Abrahamson*, 507 U.S. 619, 636-37 (1993); *Calderon v. Thompson*, 523 U.S. 538 (1998). The Ninth Circuit's authority over federal habeas corpus petitions is limited to that granted it by Congress. *Felker v. Turpin*, 518 U.S. 651, 663-64 (1996). If federal courts continue to disregard Congress' clear mandate to accord deference to state court decisions, a significant number of cases, including death penalty cases, could require retrial, involving vast expenditures of resources and incurring the risk of lost evidence and witnesses. This Court should now settle the split among the circuits and decide this important question of federal law.

F. The Ninth Court Created A Significant Split Of Authority By Disagreeing With The California Supreme Court And Failing To Apply Properly The Limitations of § 2254(d)(1)

In *Anders v. California*, 386 U.S. at 738, the Court "established a prophylactic framework," *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), "designed to provide the appellate courts with a basis for

determining whether appointed counsel have fully performed their duty to support their clients' appeals to the best of their ability." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 439 (1988). To that end, when counsel concludes that an appeal is frivolous, that is to say, "lacks any basis in law or fact," *Id.* at 439 n.10, and therefore that counsel is "under an ethical obligation to refuse to prosecute" the appeal, *Id.* at 436, counsel may seek to withdraw and file not an advocate's brief but a brief that will "enable the court to decide whether the appeal is so frivolous that the defendant has no federal right to have counsel present his or her case to the court." *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 440 n.13. *Anders* held that the defendant may not be denied that right "based on appointed counsel's bare assertion that he or she is of the opinion that there is no merit to the appeal." *Penson v. Ohio*, 488 U.S. 75, 80 (1988). Instead, the attorney is to file "a brief referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. at 744.

The California Supreme Court applied *Anders* in *Wende*. There, counsel

> filed a brief which set forth a summary of the proceedings and facts with citations to the transcript, raised no specific issues, and called upon the court to make a thorough review of the entire record to determine for itself whether there were any arguable issues. Counsel submitted a declaration stating that he had advised defendant of the nature of the brief, that he would send defendant a copy of the brief, and that he had informed defendant that the court would permit him to file a brief on his own behalf. Counsel stated that he was not requesting to withdraw but that he would advise

> defendant that he could move to have counsel relieved if he so desired.

People v. Wende, 25 Cal. 3d at 438. The court concluded *Anders* required it to "conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous" and rejected the People's "assert[ion] that the approach taken by counsel in the opening brief did not satisfy the standards set forth in *Anders*." *People v. Wende*, 25 Cal. 3d at 441-42, 600 P.2d at 1074-75, 158 Cal. Rptr. at 842-43.

In holding that *Wende* is contrary to *Anders* because appellate counsel does not "'draw attention to "anything in the record that might arguably support the appeal,"'" Appendix A, the Ninth Circuit has created a significant split of authority with the California Supreme Court on the important federal question of the duties of appointed counsel. Had the Ninth Circuit properly applied the AEDPA, this split could have been avoided.

The Ninth Circuit initially erred in the instant case when it applied the "contrary to" prong of 28 U.S.C. § 2254(d)(1) instead of the "unreasonable application" prong.[5] The factual context presented by the *Wende* brief filed in Delgado's direct appeal is distinguishable from the no-merit letter submitted in *Anders*. In *Anders*, counsel submitted a three paragraph letter that told the court there was no merit to the appeal but provided no information about the facts and procedural history of the case, other than the fact that Anders had been convicted of possession of narcotics. Delgado's *Wende* brief contained not a bare assertion that the appeal was frivolous but an extensive statement of the procedural and

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5. As noted above, this Court will consider the meaning of the terms "contrary to" or "unreasonable application of" in *Williams v. Taylor*, 119 S. Ct. at 1355.

historical facts. *Cf. Penson v. Ohio*, 488 U.S. at 81 n.3 (quoting the no-merit letter in *Anders*) *with* Appendix G (Delgado's *Wende* brief). The Ninth Circuit failed to recognize that a *Wende* brief is a very different type of submission than the *Anders* no-merit letter, a difference that requires testing under the "unreasonable application" prong of § 2254(d).

Even if evaluated under the "contrary to" prong of § 2254(d), the procedure articulated in *Wende* fully complies with this Court's precedents. By summarizing the factual and procedural history of the case, a *Wende* brief "draw[s] attention to 'anything in the record that might arguably support the appeal'" and "serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson v. Ohio*, 488 U.S. at 81-82 (n. omitted).

The brief filed by Delgado's attorney on direct appeal demonstrates this point. Counsel discussed the evidence and noted that Delgado agreed to a maximum sentence of fifteen years and received a sentence of fifteen years. App. G. In affirming, the state court of appeal conducted an independent review of the record and read and considered Delgado's supplemental briefing, which argued the same basis for reversal as those later identified by the district court as "legitimate, specific, and compelling." The state court of appeal then concluded there were no arguable issues. App. E. Thus, the *Wende* brief satisfied the goals and principles of *Anders* and *Penson*.

The Ninth Circuit divined from *Anders* an obligation to identify issues and found *Wende*'s omission of such an obligation fatally defective. But the California Supreme Court's conclusion that *Anders* does not obligate counsel to identify issues is not contrary to or an unreasonable application of this Court's opinions, which

dictate record, not issue, references. *Anders v. California*, 386 U.S. at 744 (stating that counsel must file "a brief referring to anything in *the record* that might arguably support the appeal" (italics added)); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. at 430 (describing *Anders* as holding "counsel could not withdraw by simply advising the court of his or her conclusion, but must include with the request to withdraw 'a brief referring to anything in the record that might arguably support the appeal'"); *Penson v. Ohio*, 488 U.S. at 80 (stating that under *Anders* a motion to withdraw must "'be accompanied by a brief referring to anything in the record that might arguably support the appeal'"); *Penson v. Ohio*, 488 U.S. at 82 and n.5 (noting that failure to file a brief "deprived the court of the assistance of an advocate in its own review of the cold record on appeal" and that "[o]ne hurdle faced by an appellate court in reviewing a record on appeal without the assistance of counsel is that the record may not accurately and unambiguously reflect all that occurred at the trial. Presumably, appellate counsel may contact the trial attorney to discuss the case and may thus, in arguing the appeal, shed additional light on the proceedings below. The court, of course, is not in the position to conduct such *ex parte* communications."). As the Supreme Court of Pennsylvania observed,

> The major thrust of *Anders* was to assure a careful assessment of any available claims that an indigent appellant might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal.

Com. v. McClendon, 495 Pa. 467, 473, 434 A.2d 1185, 1188 (Pa. 1981).

The California Supreme Court is not alone in interpreting *Anders* as not requiring a specification of issues. After noting the obligation to refer to anything in the record that might arguably support an appeal, Oregon's Supreme Court said, "We do not believe that the ethical relationship of Oregon counsel to client or court is furthered at all by compelling counsel to spell out the potentially limitless variety of 'arguably supportive' issues that counsel can fabricate or discern." *State v. Balfour*, 814 P.2d 1069, 1079 (Or. 1991). The court concluded that counsel confronted with a frivolous appeal should file a brief "divided into two sections, Section A and Section B. Section A of the appellant's brief shall contain a statement of the case, including a statement of facts, sufficient to apprise the court of the jurisdictional basis for the appeal. Section A, under those circumstances, *shall contain no assignments of error or argument*." *State v. Balfour*, 311 Or. at 451, 814 P.2d at 1080 (citation omitted, italics added). "Section B . . . shall raise any claim of error requested by the client" but is not signed by the attorney. *Id.* at 452, 814 P.2d at 1080.

The procedure of the Arizona Court of Appeals "does not require appointed counsel to allege arguable issues if counsel determines none exists." *State v. Clark*, ___ Ariz. ___, ___ P.2d ___, 1999 WL 16739, *1 (Ariz. Ct. App. 1999), pet. for rev. pending. The procedures are very similar if not identical to those established in *Wende*, including an opportunity for the defendant to file a brief and independent review of the record. *Id.* at 1999 WL 16739, *8.

In any given case, a creative lawyer could hypothesize and present a wide variety of frivolous issues. It is neither contrary to nor an unreasonable application of *Anders* to conclude that such information is unnecessary to assist the court "in determining both that counsel in fact conduct the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided

without an adversary presentation." *Penson v. Ohio*, 488 U.S. at 81-82. That assistance comes from a brief referring to the record, which, thanks to appellate counsel's efforts, is no longer "'cold'" and is more likely to be accurate. *Penson v. Ohio*, 488 U.S. at 82 and n.5.

This analysis, ignored when offered by Petitioners below, was advanced by the Arizona Court of Appeals in *Clark*. The court expressly disagreed with the Ninth Circuit's analysis in *Robbins*, further aggravating the split of authority. *Clark* explained that

> [b]y requiring counsel to file an *Anders* brief setting forth a detailed factual and procedural history of the case with citations to the record, this court can satisfy itself that counsel has in fact thoroughly reviewed the record. This requirement assures that appointed counsel has diligently provided substantially equal representation to the indigent defendant. In addition, these citations to the record assist the court in determining whether counsel correctly concluded that the appeal is frivolous.

State v. Clark, at 1999 WL 16739, *9.

Because *Wende* approved a briefing procedure that satisfies the twin purposes of *Anders* – assisting the court in determining that counsel has conducted a detailed review of the record and ensuring that the appeal is frivolous – the *Wende* procedure is not contrary to or an unreasonable application of *Anders*. The mere act of filing such a brief, therefore, did not render appellate counsel's performance incompetent, and Delgado is not entitled to habeas relief.

G. The Ninth Circuit Failed To Give Adequate Deference To The State Court's Rejection Of Delgado's Claim When The Court Refused To Require Delgado To Establish Prejudice

Petitioners argued below that even if Delgado's attorney had acted incompetently, prejudice should not automatically be presumed. Delgado's claim of ineffective assistance of appellate counsel fails because Delgado did not establish prejudice as required by *Strickland v. Washington*, 466 U.S. at 687. The Ninth Circuit rejected that argument, concluding the filing of an appellate brief that fails to identify any arguable issues leaves the defendant without counsel on appeal.[6] App. A.

This holding compounds the damage done by the court's invalidation of the *Wende* procedure. Absent a showing of prejudice, habeas petitioners who cannot identify any claim that should have been raised by counsel on direct appeal will be entitled to a second appeal, consuming scarce judicial resources to review yet again cases in which no one -- not the attorney on direct appeal, not the state court of appeal, not the defendant -- can find any trial error.

The Ninth Circuit failed to recognize the differences between this case and *Penson*. In *Penson*, "counsel was permitted to withdraw before the court reviewed the record on nothing more than 'a conclusory statement by the appointed attorney on appeal that the case has no merit and that he will file no brief.'" *Id.* at 78. The defendant's request for new counsel was denied. *Id.* at 78. "In due course, and without the assistance of any advocacy for petitioner, the Court of Appeals made its own examination of the record," "noted that counsel's certification that the appeal was meritless was 'highly

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6. As noted above, this Court has granted certiorari on this issue in *Robbins*.

questionable,'" "found 'several arguable claims,'" "concluded that plain error had been committed in the jury instructions concerning one count," reversed on that count

> but affirmed the convictions and sentences on the remaining counts. It concluded that petitioner 'suffered no prejudice' as a result of 'counsel's failure to give a more conscientious examination of the record' because the court had thoroughly examined the record and had received the benefit of arguments advanced by counsel for petitioner's two codefendants.

Penson v. Ohio, 488 U.S. at 79.

This Court rejected the state's argument that any error in granting withdrawal and failing to appoint new counsel was not prejudicial.

> The primary difficulty with the State's argument is that it proves too much. No one disputes that the Ohio Court of Appeals concluded that the record below supported a number of arguable claims. Thus, in finding that petitioner suffered no prejudice, the court was simply asserting that, based on its review of the case, it was ultimately unconvinced that petitioner's conviction—with the exception of one count—should be reversed. Finding harmless error or a lack of *Strickland* prejudice in cases such as this, however, would leave indigent criminal appellants without any of the protections afforded by *Anders*. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court

> would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by *Douglas* and *Anders*.

Penson v. Ohio, 488 U.S. at 86.

Penson involved a *complete denial of counsel* on appeal *when the reviewing court found arguable issues*. *Id.* at 88 ("[I]t is important to emphasize that the denial of counsel in this case left petitioner completely without representation during the appellate court's actual decisional process. This is quite different from a case in which it is claimed that counsel's performance was ineffective."); *Penson v. Ohio*, 488 U.S. at 86. ("The present case is unlike a case in which counsel fails to press a particular argument on appeal, *cf. Jones v. Barnes*, 463 U.S. 745 (1983), or fails to argue an issue as effectively as he or she might. Rather, at the time the Court of Appeals first considered the merits of Petitioner's appeal, appellate counsel had already been granted leave to withdraw; Petitioner was thus entirely without the assistance of counsel on appeal. In fact, the only relief that counsel sought before the Court of Appeals was leave to withdraw, an action that can hardly be deemed advocacy on petitioner's behalf.").

Here, counsel did not withdraw before the court reviewed the record, *and* the court did not find any arguable issues. Essentially, the Ninth Circuit disagreed with the California Court of Appeal and California Supreme Court by finding merit in the issues Delgado raised in his supplemental briefing filed in the California Court of Appeal. Delgado was not "completely without representation during the court's actual decisional process," *Penson v. Ohio*, 488 U.S. at 88, because, unlike the attorney in *Penson*, counsel submitted a *Wende* brief,

not simply a conclusory statement that the appeal had no merit and that he would not file a brief. And because the court found no arguable issues, particularly after reviewing Delgado's supplemental briefing, Delgado, unlike the defendant in *Penson*, had no right to adversary representation. Under the very different circumstances in this case, a habeas petitioner must establish prejudice. *Cf. Ex Parte Dunn*, 514 So. 2d 1300, 1304 and n.3 (Ala. 1987) (concluding that where no brief on appeal is filed, prejudice is presumed but where *Anders* is followed and briefs are filed, a showing of prejudice would generally be required under *Strickland*).

H. The Ninth Circuit's Erroneous Conclusion That A Federal Court's Post-AEDPA Collateral Review Of A State Court Decision Is Not Possible If The State court Failed To Provide Reasons For Its Decision, Thus Requiring An Independent Review, Contributes To The Split Of Authority Among United States Courts Of Appeals On This Important Question Of Federal Law

The Ninth Circuit further erred by concluding a federal court cannot review a state court's application of Supreme Court law if the state court fails to provide an explained decision. Rather, the Ninth Circuit concluded, the federal court must conduct an independent review to ascertain whether the state court decision is contrary to or an unreasonable application of Supreme Court precedent. Based upon this decision, as well as the Ninth Circuit's own definitions and use of the terms "independent review" and "de novo review," independent review is the functional equivalent of de novo review. De novo review of a state court decision is violative of § 2254(d)'s requirement that federal courts accord deference to state court decisions.

The original *Delgado* opinion expressly held if a state court failed to provide any rationale for its decision, the federal court would be required to conduct an independent review of the claims, or, de novo review. The original opinion also asserted it was appropriate for a federal court to give a state court summary denial "less deference" than federal courts normally accorded state court decisions under the AEDPA. For this proposition, the court cited two cases in which the federal court sat as an independent fact-finder. App. B, *Delgado v. Lewis*, 168 F.3d 1148, 1151-53 (1999). The amended Opinion did little more than eliminate the original Opinion's express assertion that de novo review was appropriate when a state court issues a summary denial. The amended Opinion insists in a footnote that an independent review of the record is not synonymous with de novo review. However, the amended Opinion fails to define the difference. App. A. It is difficult to ascertain what that difference could be in light of the fact that the original Opinion used the terms interchangeably, as the Ninth Circuit has consistently done in its own prior opinions. App. B, *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999), (CA9 1999); *Saridakis v. United Airlines*, 166 F.3d 1272, 1275-76 (9th Cir. 1999); *Public Service Co. of Colorado v. Batt*, 67 F.3d 234, 237 n.3 (9th Cir. 1995); *Jacobsen v. U.S. Postal Service*, 993 F.2d 649, 653-54 (9th Cir. 1992); *In re Marquam Inv. Corp.*, 942 F.2d 1462, 1467 (9th Cir. 1991); *Collazo v. Estelle*, 940 F.2d 411, 415 (9th Cir. 1991); *McQueary v. Blodgett*, 924 F.2d 829, 832 (9th Cir. 1991); *Robinson v. Borg*, 918 F.2d 1387, 1390 (9th Cir. 1990); *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990); *Moss v. C.I.R.*, 831 F.2d 833, 838-39 (9th Cir. 1987); *Chaney v. Lewis*, 801 F.2d 1191, 1194-95 (9th Cir. 1986); *United States v. Givens*, 767 F.2d 574, 580 (1985); *Perry v. O'Donnell*, 749 F.2d 1346, 1348 (1984); *Sorrell v. Securities and Exchange Com'n*, 679 F.2d 1323, 1326 n.2 (1982). The Ninth Circuit's insistence upon independent review

provides a dangerous precedent and invites endless litigation. Furthermore, in this precise context, another United States Court of Appeals' decision concluded independent review is the equivalent of de novo review. *Cardwell v. Greene*, 152 F.3d 331, 339 (4th Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S. Ct. 587, 142 L. Ed. 2d 491 (1998).

Independent or de novo review is entirely inconsistent with § 2254(d). Section 2254(d) does not require a state court to establish a pathway of reasons to support a decision. By enacting the AEDPA, Congress exercised its legislative prerogative to limit the authority of the federal courts in granting collateral review of final state court convictions. Congress deliberately chose to restrict the jurisdiction of the federal courts in reviewing state court convictions. In doing so, Congress eliminated federal collateral de novo review. In fact, the "rule of deference" was the "single most important provision contained in the habeas reform proposal bill." 104th Congress, 1st Sess., 141 Cong. Rec. S7841, S7846 (June 7, 1995). There is no reason to think that Congress used "adjudication on the merits" to mean "written explained decisions." In its previous form, § 2254(d) afforded a presumption of correctness to state court factual determinations, but only if "evidenced by a written finding, written opinion, or other reliable and adequate written indicia. . . ." Congress struck these limitations from the statute, which now simply affords a presumption of correctness to "a determination made by a State court. . . . " Thus, Congress forcefully signalled its determination that state court summary adjudication procedures merit full deference.

Numerous federal courts have addressed the § 2254(d) deference standard in the context of a state court summary denial. Some courts have concluded a state court decision requires deference irrespective of whether the decision included any rationale. *Hollman v. Wilson*,

158 F.3d 177, 180 n.3 (3d Cir. 1998); *Parker v. Angelone*, 959 F. Supp. 319, 322-23 (E.D.Va. 1997); *McLee v. Angelone*, 967 F. Supp. 152, 156-57 (E.D.Va. 1997). Some courts have concluded no reasoning is required, but suggested if a state court provides reasoning, the decision is more likely to withstand federal collateral review. *Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998) [the court concluded it would not "presume that a summary order is indicative of a cursory or haphazard review of a petitioner's claims."]; *Weeks v. Angelone*, 4 F. Supp. 2d 497, 522 (E.D.Va. 1998) [still, the key inquiry focuses on the state court decision, not the rationale]; *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) ["It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case."]. Finally, some courts, including the Ninth Circuit decision in this case, have concluded independent or de novo review is required. *Cardwell v. Greene*, 152 F.3d at 339; *U.S. Ex Rel. Maxwell v. Gilmore*, 37 F. Supp. 2d 1078 (N.D.Ill. 1999).

In *Cardwell*, the court concluded that because the state court decision failed to provide any rationale for its determination, the court was required to conduct an "independent" review of the record. The court also added:

> 'Where . . . there is no indication of how the state court applied federal law to the facts of a case, a federal court must necessarily perform its own review of the record . . . . Thus, on the facts of this case, the distinction between de novo review and "reasonableness" review becomes [in]significant.'

Id. at 339.

The erroneous notion that a federal court should focus on a state court's reasoning originated from language in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *overruled* on other grounds in 521 U.S. 320 (1997). In *Lindh*, the Seventh Circuit noted a federal court must take into account the "care" with which the state court considered an issue. In stating this, the court was not considering whether a summary denial warranted deference. *Lindh v. Murphy*, 96 F.3d at 871. However, many federal courts subsequently (and improperly) imported this language into the context of whether federal courts must evaluate a state court's reasoning.

Recently, in *Maxwell v. Gilmore*, 37 F. Supp. 2d 1078, the court noted the various cases that have mandated deference to state court summary denials, as well as the cases that have concluded de novo review is required. One case the court relied upon that requires de novo review was the Ninth Circuit's original decision in this case. The court also listed *Cardwell* and *Porter v. Gramley*, 112 F.3d 1308, 1313 (7th Cir. 1997), citing *Lindh*. The court then concluded de novo review was proper, in light of the state court summary denial. *Maxwell v. Gilmore*, 37 F. Supp. 2d at 1088-89. The diversity of positions taken by various United States courts of appeals requires this Court's intervention.

Cardwell spearheaded the alleged validity of de novo review in this context, though this Court has stated, in another context, that when a reviewing court must review a decision without the benefit of any reasoning from the lower court, the reviewing court must "undertake a cumbersome review of the record to determine what facts the . . . [lower court], in the light most favorable to the . . . [prevailing] party, likely assumed." *Johnson v. Jones*, 515 U.S. 304 (1995). While in this case the Ninth Circuit relied upon *Cardwell's* assertion that independent review was required, the panel omitted the next sentence in *Cardwell*, which explained any difference between

"'reasonableness'" review and de novo review was "'insignificant'" in this context. It is difficult to divine that an independent review of the record somehow defines anything but de novo review. If there is any remaining question, the Ninth Circuit's analysis of the underlying facts in the instant case is revealing. The California Court of Appeal and California Supreme Court rejected Delgado's proffered issues. The Ninth Circuit deemed those same issues "legitimate" and "compelling" and went on to provide a summary of the alleged inadequacies of trial counsel. There is no question the Ninth Circuit accorded no deference to the state court implied factual findings. The Ninth Circuit made no mention of viewing the facts in the light most favorable to the state court denials of relief, nor to viewing the facts as the state courts must have found them in order to deny relief.

The varied manner in which federal courts have interpreted § 2254(d) necessitates this Court's intervention in order to implement Congress' intent that federal courts accord deference to state court decisions in post-AEDPA collateral review. This is a pressing and recurring issue of critical importance that demands this Court's attention.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Dated: September 9, 1999.

Respectfully submitted,

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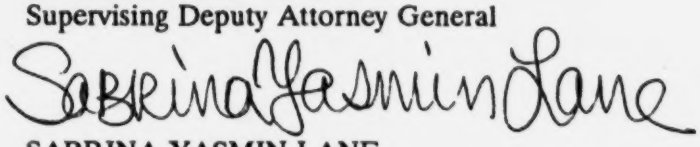

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162.

Submitted Oct. 5, 1998. [FN1]

Opinion Filed Feb. 23, 1999.
Opinion Withdrawn June 23, 1999.
Filed June 23, 1999.

Sabrina Y. Lane, Deputy Attorney General, San Diego, California, for the respondents-appellants.

Michael B. Dashjian, Solvang, California, for the petitioner-appellee.

Appeal from the United States District Court for the Central District of California. Manuel L. Real, District Judge, Presiding. D.C. No. CV-96-07241-R.

Before: Harry Pregerson, Dorothy W. Nelson, and Sidney R. Thomas, Circuit Judges.

ORDER

THOMAS, Circuit Judge:

*1 The opinion filed on February 23, 1999, and reported at 168 F.3d 1148 (9th Cir.1999), is withdrawn, and the attached opinion is filed in its place.

With the amendments to the opinion, the petition for rehearing is denied. The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Thus, the suggestion for rehearing en banc is rejected.

OPINION

Jesus Garcia Delgado claims his appellate counsel ineffectively assisted him by failing to raise any arguable issues in his appellate brief. The district court agreed and granted his petition for a writ of habeas corpus. We affirm.

I

Delgado is a forty-five-year old man of Hispanic descent who speaks and understands very little English. In 1994, he was arrested along with five codefendants and charged with manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale. The felony complaint also sought sentence enhancements.

Delgado initially rejected a plea agreement and entered a plea of not guilty, but subsequently pled guilty to the three counts and the two sentence enhancements. As part of a global joint plea agreement, the state sentencing judge agreed not to sentence any of the defendants to more than fifteen years and agreed to consider mitigating factors at the sentencing hearing.

Delgado's appointed trial counsel did not attend the preliminary hearing, the sentencing hearing, or Delgado's signing of the change-of-plea agreement. In fact, an attorney for a codefendant explained the change-of-plea agreement and form to Delgado. Delgado's trial counsel did accompany his client to the change-of-plea hearing, but had to admit to the district court that he had not explained the change-of-plea form to Delgado and instead that he had relied on a codefendant's attorney to do so. The court asked the other attorney, who was present representing his own client, if he had explained the change-of-plea form to Delgado. The codefendant's attorney stated that the interpreter told him that Delgado had some questions, but that he had answered them and Delgado "appeared" to understand the explanation.

When the court asked Delgado how he pled to the first charge, he replied, "I have always said I was innocent. Oh, okay, guilty." He answered guilty to the other two charges and admitted the sentence enhancements.

Delgado's appointed counsel also failed to appear at the sentencing hearing. In his absence, an attorney for yet another codefendant indicated she would temporarily represent Delgado, whom she said had agreed to the arrangement. The sentencing hearing commenced, with the attorneys for all of the other defendants making arguments on behalf of their clients. Delgado's "substitute" counsel separately represented another codefendant at the

hearing and, after extensive argument, obtained a favorable agreement resulting in probation for her client. When the court turned to Delgado's sentence, however, the substitute counsel simply said, "I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get." Delgado was never asked if he wished to make a statement on his own behalf, and the record is unclear about whether Delgado had the assistance of an interpreter. Finally, the judge noted that he had reviewed the probation office's report but had not "received any other documentation in connection with this case." He then sentenced Delgado to fifteen years-the maximum under the plea agreement-notwithstanding the fact that Delgado had no known criminal record.

*2 Although making only a cameo appearance on behalf of his client before the imposition of sentence, Delgado's appointed counsel did manage to file a request for a certificate of probable cause, which stated that Delgado wanted to appeal his plea because: (1) "the translation to Spanish as well as the advice by the attorney regarding plea negotiations and actual entry of plea were inadequate," and (2) he had wanted to "withdraw his plea prior to sentencing but confusion in translation and attorney communication prevented this from being raised."

New counsel was appointed to argue the appeal for Delgado. In discharge of his duties, appellate counsel filed a brief that did not raise any issues or ask for reversal on any ground, not even those grounds identified by trial counsel in his request for a certificate of probable cause. Instead, the brief merely recited the allegations of the charging documents and invited the California Court of Appeals to conduct an independent review of the record.

Although his appointed appellate counsel had not withdrawn, Delgado filed his own supplemental brief alleging ineffective assistance of trial counsel under both the state and federal constitutions. He alleged that his trial counsel had been ineffective in advising him to enter a guilty plea, that his counsel had not consulted with him because of the difficulty in communicating through an interpreter, and that he had entered a guilty plea due to a mistaken belief that his sentence would be time served. Finally, he argued that his appointed counsel was absent from the sentencing hearing and that no attorney had argued on his behalf regarding mitigation.

The Court of Appeals for the Fourth District of California affirmed the conviction without opinion, stating only that it had conducted an independent review of the record and found no arguable issues. Delgado then filed a pro. per. petition in the Supreme Court of California, which was denied without opinion. Next, Delgado filed a petition for a state writ of habeas corpus in the Supreme Court of California, alleging ineffective assistance of trial and appellate counsel under both the state and federal constitutions on the same grounds he had raised in his pro. per. direct appeal. Delgado also asserted that his appellate counsel had been ineffective because he had failed to raise trial counsel's ineffectiveness in the appellate brief and failed to send him copies of the trial transcripts as required by California law. Finally, Delgado alleged that he misunderstood, due to his inability to speak or understand English, that his plea would subject him to a fifteen-year sentence. The Supreme Court of California denied his state habeas petition in a one sentence order.

On October 15, 1996, Delgado filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of

appellate counsel. The district court granted Delgado's petition, stating that unless the California Court of Appeals reinstated Delgado's direct appeal and provided him with new counsel within sixty days, he would be released from prison. Deputy Warden Lewis filed a timely notice of appeal with this court, but did not seek a stay of the district court's Order. Accordingly, the California Court of Appeals vacated its prior opinion, reinstated Delgado's direct appeal, appointed new counsel pursuant to the Order, but stayed the state proceedings pending the outcome of this appeal.

II

*3 Delgado properly exhausted the remedies available to him in state court, as required by 28 U.S.C. § 2254(b)(1), by filing a state writ of habeas corpus in the Supreme Court of California alleging ineffective assistance of trial and appellate counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). His allegations in the state court petition of ineffective assistance in violation of both the California and United States Constitutions were sufficient to "fairly present" the claim to the state court. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Although Delgado's petition did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), his petition was sufficient to alert the State to both state and federal precedent governing his claim of ineffective assistance of counsel, including Anders.

III

Because Delgado filed his federal habeas petition after April 1, 1996, the Anti-Terrorism and Effective

Death Penalty Act ("AEDPA") applies to his petition. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Under AEDPA, a federal court may grant habeas relief if a state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West Supp.1998).

As recently noted by a panel of our court, AEDPA's standard of review provisions "reflect the ... general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir.1999). Under Davis:

> [A] state court decision amounts to an unreasonable application of clearly established federal law where the state court fails to apply a legal principle, enunciated in one or more Supreme Court decisions, to a situation where such application is required by the force and logic of the Court's decision.

Id.

Davis provides a framework for analyzing state court opinions under AEDPA. Unfortunately, when a state court does not articulate the rationale for its determination, a review of that court's "application" of

clearly established federal law is not possible. [FN2] See Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998). Thus, when confronted with a state court decision that does not provide the basis of its decision, we must determine whether, in light of an independent review of the record and the relevant federal law, the state court's resolution of a petitioner's claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." [FN3] 28 U.S.C.A. § 2254(d)(1).

IV

A

*4 After conducting an independent review of the record and the relevant federal law, we conclude that the California state court's resolution of this case was contrary to clearly established Federal law, as determined by the Supreme Court of the United States. The district court correctly concluded that Delgado had been denied his Sixth Amendment right to effective assistance of appellate counsel under Strickland v. Washington, which is "clearly established" law for the purposes of AEDPA. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997). The district court properly determined that Delgado's appellate counsel was ineffective because he failed to raise any arguable issues in the appellate brief in violation of the procedure announced in Anders v. California.

Under clearly established federal law as determined by the Supreme Court, all criminal defendants have a right to an advocate in mandatory appeals. See Douglas v. California, 372 U.S. 353, 355-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Appellate counsel has an ethical responsibility

of constitutional dimension to argue zealously those issues that counsel finds not wholly frivolous. See Anders, 386 U.S. at 744. When an attorney believes an appeal would violate his or her ethical duty to refrain from making frivolous arguments, Anders requires counsel to "advise the court and request permission to withdraw." Id. A request to withdraw, "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The attorney must send the brief to the defendant and the defendant must be informed of his or her right to file a supplemental brief. See id.

The reviewing court then must make a full examination of all of the proceedings to determine if the appeal is in fact wholly frivolous. See id. If the court finds the appeal to be frivolous, the court may permit counsel to withdraw. See id. If the court finds any arguable issues, it must appoint counsel for the defendant. See id. The reason for this exacting procedure is to ensure that indigent defendants receive the same legal assistance that nonindigent defendants receive. See id. at 745. In addition, the brief containing "ready references" to arguable issues assists the court in its vigorous review, rather than presenting the court with a cold record. See id.

These mandates were violated in this case. The appellate brief filed on Delgado's behalf "failed to draw attention to 'anything in the record that might arguably support the appeal' "-a failure that left Delgado constructively without counsel on appeal. Penson v. Ohio, 488 U.S. 75, 81, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (quoting Anders, 386 U.S. at 744). In addition, counsel did not file a motion to withdraw as required by Anders. See 386 U.S. at 744. Thus, Delgado's appellate counsel rendered constitutionally deficient representation within the meaning of Strickland. See Davis, 167 F.3d at 497-98

(applying AEDPA to an identical challenge under Strickland and Anders and determining that the Supreme Court in Anders clearly established that appellate counsel must raise arguable issues in an Anders brief).

*5 Contrary to the Deputy Warden's contention, AEDPA does not preclude the district court's application of Anders to invalidate California's no-merit brief procedure approved in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (Cal.1979). In Davis, we examined the interplay between Anders and the California no-merit brief procedure approved in Wende, and concluded that the Wende procedure did not comport with the constitutional requirements of Anders. See 167 F.3d at 498; see also Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir.1998) (holding that, for retroactivity purposes in a case in which appellate counsel had filed a Wende brief, "[a]pplication of Anders ... required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of Anders. Accordingly, no 'new' constitutional rule was invoked in this case"), cert. granted, --- U.S. ----, 119 S.Ct. 1139, 143 L.Ed.2d 207 (1999). Likewise, in this case we have applied existing Supreme Court precedent to reach our decision, a methodology consistent with AEDPA.

Further, AEDPA does not "compel" federal courts to turn an amaurotic eye to state court proceedings, nor to rubberstamp unexplained state court decisions without regard to whether they are contrary to clearly established Federal law as determined by the Supreme Court. Indeed, true cooperative federalism demands a more nuanced approach. In this case, the results hardly could be more plain. Anders has been clearly established law of the United States Supreme Court for more than thirty years. As Chief Judge Hug determined, Wende procedures do not comport with the "very low threshold" established by

the Supreme Court in Anders. See Robbins, 152 F.3d at 1067-68. And as the Davis court held, nothing in AEDPA alters that assessment. See 167 F.3d at 498.

On the face of this record, Delgado's appellate counsel failed to satisfy Anders by first refusing to identify any appellate issues, despite the prior listing of potential issues by trial counsel, and by then neglecting to seek to withdraw as counsel. These errors rendered appellate counsel's performance constitutionally deficient under the Sixth Amendment. See Strickland, 466 U.S. at 687-91; Davis, 167 F.3d at 498.

B

*6 The district court properly held that under Strickland, Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice. See Penson, 488 U.S. at 86; Davis, 167 F.3d at 499. As the Supreme Court explained in Penson, when appellate counsel's only action is to file a motion to withdraw that raises no arguably appealable issues, a petitioner is "completely without representation during the appellate court's actual decisional process." 488 U.S. at 88. Merely filing a no-merit brief similarly leaves a petitioner without representation on appeal. This situation differs radically from the case "in which counsel fails to press a particular argument." Id. Thus, when counsel fails to raise any arguable issues in the appellate brief, it is "inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman." Id. at 88-89; see also Lofton v. Whitley, 905 F.2d 885, 887-88 (5th Cir.1990) (presuming prejudice when counsel failed both to raise arguable issues in the appellate brief and ask for leave to withdraw).

The wisdom of this rule is amply demonstrated in this case. Throughout his journey in the criminal justice system, Delgado had hardly any assistance, much less effective assistance, of appointed counsel. His appointed trial counsel, who purportedly met with Delgado on only three occasions, was absent from almost all of the court proceedings. Instead, Delgado received his advice and representation from attorneys for his codefendants who, although no doubt well- meaning, had other priorities and inherent conflicts of interest in this multi- defendant drug conspiracy case-a case in which even the judge noted the "finger-pointing" among codefendants. No one submitted any evidence or even argument for mitigation of his sentence, although factors that might have supported a reduction existed.

Although trial counsel's ineffective assistance pre-sented a legitimate, specific, and compelling appellate issue, it was never developed or presented by counsel. Even after specific appellate issues were identified in the certificate for probable cause, Delgado's appointed appellate counsel ignored them, simply choosing to inform the court that there were no arguable issues. When appellate counsel deliberately elected to ignore the requirements of Anders, he completely deprived Delgado of the right to counsel on appeal. Thus, the district court appropriately held that Delgado's Sixth Amendment rights had been violated.

C

The legal assistance provided in this case did not comport with the representation of indigent defendants contemplated by the Supreme Court in Anders, Penson, Strickland, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon 's

trumpet quiet and meaningless as wind in dry grass. We affirm the judgment of the district court.

*7 AFFIRMED.

FN1. The panel finds this case appropriate for submission without oral argument pursuant to Federal Rule of Appellate Procedure 34(a).

FN2. We note that in Davis v. Kramer, the California Court of Appeals supplied a decision, albeit unpublished, explaining why it was denying Davis's appeal. See 167 F.3d at 496. In this case, the California Court of Appeals affirmed Delgado's conviction without opinion. The court made no factual findings nor drew any conclusions of law. The Supreme Court of California summarily denied review. Six months later, the Supreme Court of California denied Delgado's petition for habeas relief, again without explanation. Thus, Davis presented different factual circumstances than are present here.

FN3. Conducting an independent review of the record and applicable federal law when the state has not articulated its reasoning is not the equivalent of applying a de novo standard of review to state court decisions under these circumstances; rather, it provides the method for ascertaining whether the state court's resolution of the case was "contrary to, or involved an unreasonable application of, clearly established Federal law" under AEDPA. 28 U.S.C.A. § 2254(d)(1). This approach is in consonance with the deference we have accorded state court findings of fact on habeas review. Although AEDPA ordinarily requires federal courts to defer

to state court factual findings, we have, in a number of cases in which the state court did not make findings of fact, granted less deference to the state court decision. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997) (holding that when a state court has made no findings of fact, "the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA"); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir.1996) (stating that the district court's evidentiary hearing was the first chance that the petitioner had to develop the factual basis of his claim and therefore finding that it would be inappropriate to disregard the facts developed in the district court even in the light of AEDPA), cert. denied, 520 U.S. 1151, 117 S.Ct. 1329, 137 L.Ed.2d 489 (1997).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162.

Submitted Oct. 5, 1998. [FN1]

FN1. The panel finds this case appropriate for submission without oral argument pursuant to Federal Rule of Appellate Procedure 34(a).

Decided Feb. 23, 1999.

Petitioner who pleaded guilty in state court to manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale petitioned for federal habeas corpus relief. The United States District Court for the Central District of California, Manuel L. Real, J., granted petition. State appealed. The Court of Appeals, Thomas, Circuit Judge, held that: (1) petitioner exhausted state remedies; (2) district court was required to apply de novo review to petitioner's claims; (3) petitioner's state appellate counsel rendered

constitutionally deficient representation; and (4) appellate counsel's deficient performance created presumption of prejudice.

Affirmed.

*1149 Sabrina Y. Lane, Deputy Attorney General, San Diego, California, for respondents-appellants.

Michael B. Dashjian, Solvang, California, for petitioner-appellee.

Appeal from the United States District Court for the Central District of California; Manuel L. Real, District Judge, Presiding. D.C. No. CV-96-07241- R.

Before: PREGERSON, DOROTHY W. NELSON, and THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

Jesus Garcia Delgado claims his appellate counsel ineffectively assisted him by failing to raise any arguable issues in his appellate brief. The district court agreed and granted his petition for a writ of habeas corpus. We affirm.

I

Delgado is a forty-five-year old man of Hispanic descent who speaks and understands very little English. In 1994, he was arrested along with five codefendants and *1150 charged with manufacturing methamphetamine, possession of ephedrine with intent to manufacture methamphetamine, and possession of methamphetamine for sale. The felony complaint also sought sentence enhancements.

Delgado initially rejected a plea agreement and entered a plea of not guilty, but subsequently pled guilty to the three counts and the two sentence enhancements. As part of a global joint plea agreement, the state sentencing judge agreed not to sentence any of the defendants to more than fifteen years and agreed to consider mitigating factors at the sentencing hearing.

Delgado's appointed trial counsel did not attend the preliminary hearing, the sentencing hearing, or Delgado's signing of the change-of-plea agreement. In fact, an attorney for a codefendant explained the change-of-plea agreement and form to Delgado. Delgado's trial counsel did accompany his client to the change-of-plea hearing, but had to admit to the district court that he had not explained the change-of-plea form to Delgado and instead that he had relied on a codefendant's attorney to do so. The court asked the other attorney, who was present representing his own client, if he had explained the change-of-plea form to Delgado. The codefendant's attorney stated that the interpreter told him that Delgado had some questions, but that he had answered them and Delgado "appeared" to understand the explanation.

When the court asked Delgado how he pled to the first charge, he replied, "I have always said I was innocent. Oh, okay, guilty." He answered guilty to the other two charges and admitted the sentence enhancements.

Delgado's appointed counsel also failed to appear at the sentencing hearing. In his absence, an attorney for yet another codefendant indicated she would temporarily represent Delgado, whom she said had agreed to the arrangement. The sentencing hearing commenced, with the attorneys for all of the other defendants making arguments on behalf of their clients. Delgado's

"substitute" counsel separately represented another codefendant at the hearing and, after extensive argument, obtained a favorable agreement resulting in probation for her client. When the court turned to Delgado's sentence, however, the substitute counsel simply said, "I'm just going to submit it on basically the Court's judgment as to exactly how much time Mr. Delgado should get." Delgado was never asked if he wished to make a statement on his own behalf, and the record is unclear about whether Delgado had the assistance of an interpreter. Finally, the judge noted that he had reviewed the probation office's report but had not "received any other documentation in connection with this case." He then sentenced Delgado to fifteen years--the maximum under the plea agreement--notwithstanding the fact that Delgado had no known criminal record.

Although making only a cameo appearance on behalf of his client before the imposition of sentence, Delgado's appointed counsel did manage to file a request for a certificate of probable cause, which stated that Delgado wanted to appeal his plea because: (1) "the translation to Spanish as well as the advice by the attorney regarding plea negotiations and actual entry of plea were inadequate," and (2) he had wanted to "withdraw his plea prior to sentencing but confusion in translation and attorney communication prevented this from being raised."

New counsel was appointed to argue the appeal for Delgado. In discharge of his duties, appellate counsel filed a brief that did not raise any issues or ask for reversal on any ground, not even those grounds identified by trial counsel in his request for a certificate of probable cause. Instead, the brief merely recited the allegations of the charging documents and invited the California Court of Appeals to conduct an independent review of the record.

Although his appointed appellate counsel had not withdrawn, Delgado filed his own supplemental brief alleging ineffective assistance of trial counsel under both the state and federal constitutions. He alleged that his trial counsel had been ineffective in advising him to enter a guilty plea, that his counsel had not consulted with him because of the difficulty in communicating through an interpreter, and that he had entered a guilty plea *1151 due to a mistaken belief that his sentence would be time served. Finally, he argued that his appointed counsel was absent from the sentencing hearing and that no attorney had argued on his behalf regarding mitigation.

The Court of Appeals for the Fourth District of California affirmed the conviction without opinion, stating only that it had conducted an independent review of the record and found no arguable issues. Delgado then filed a pro. per. petition in the Supreme Court of California, which was denied without opinion. Next, Delgado filed a petition for a state writ of habeas corpus in the Supreme Court of California, alleging ineffective assistance of trial and appellate counsel under both the state and federal constitutions on the same grounds he had raised in his pro. per. direct appeal. Delgado also asserted that his appellate counsel had been ineffective because he had failed to raise trial counsel's ineffectiveness in the appellate brief and failed to send him copies of the trial transcripts as required by California law. Finally, Delgado alleged that he misunderstood, due to his inability to speak or understand English, that his plea would subject him to a fifteen-year sentence. The Supreme Court of California denied his state habeas petition in a one sentence order.

On October 15, 1996, Delgado filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. § 2254, alleging ineffective assistance of

appellate counsel. The district court granted Delgado's petition, stating that unless the California Court of Appeals reinstated Delgado's direct appeal and provided him with new counsel within sixty days, he would be released from prison. Deputy Warden Lewis filed a timely notice of appeal with this court, but did not seek a stay of the district court's Order. Accordingly, the California Court of Appeals vacated its prior opinion, reinstated Delgado's direct appeal, appointed new counsel pursuant to the Order, but stayed the state proceedings pending the outcome of this appeal.

II

[1] Delgado properly exhausted the remedies available to him in state court, as required by 28 U.S.C. § 2254(b)(1), by filing a state writ of habeas corpus in the Supreme Court of California alleging ineffective assistance of trial and appellate counsel under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). His allegations in the state court petition of ineffective assistance in violation of both the California and United States Constitutions were sufficient to "fairly present" the claim to the state court. See Duncan v. Henry, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995). Although Delgado's petition did not specifically argue that the brief filed by his appellate counsel violated Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), his petition was sufficient to alert the State to both state and federal precedent governing his claim of ineffective assistance of counsel, including Anders.

III

[2] Because Delgado filed his federal habeas petition after April 1, 1996, the Anti-Terrorism and

Effective Death Penalty Act ("AEDPA") applies to his petition. See Lindh v. Murphy, 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir.) (en banc), cert. denied, --- U.S. ----, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997). Under AEDPA, a federal court may grant habeas relief if a state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C.A. § 2254(d) (West Supp.1998).

Consistent with the approach taken by other circuits, the district court concluded that because the state court had not articulated the reasoning for its decision when it denied Delgado's habeas petition, de novo review was necessary. See Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir.1998) (stating that *1152 part of reasonableness review under AEDPA "requires federal courts to take into account the care with which the state court considered the subject"); Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 587, 142 L.Ed.2d 491 (1998) (holding that it could not review a state court's application of "clearly established law" when the court does not give a rationale for its adverse determination; in such a case the federal court must "independently ascertain whether the record reveals a violation"); Porter v. Gramley, 112 F.3d 1308, 1313 (7th Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 886, 139 L.Ed.2d 873 (1998)

(holding that AEDPA mandates respect for state court judgments if they contain a "responsible, thoughtful answer reached after a full opportunity to litigate") (citations omitted). We agree.

[3] A more deferential standard of review of a state court's application of "clearly established law" may be warranted when the state court has provided a "thoughtfully reasoned decision." Lindh v. Murphy, 96 F.3d 856, 871 (7th Cir.1996), rev'd on other grounds, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). And, as recently noted by a panel of our court, AEDPA's standard of review provisions "reflect the ... general requirement that federal courts not disturb state court determinations unless the state court has failed to follow the law as explicated by the Supreme Court." Davis v. Kramer, 167 F.3d 494, 500 (9th Cir.1999). The Davis court went on to explore and define the meaning of "clearly established law" and "unreasonable applications of law" in a careful analysis that comports with other federal courts of appeals decisions. See id. at 500. That issue, however, is not before us because when a state court does not articulate the rationale for its determination, a review of that court's "application of clearly established Federal law" is not possible. See Cardwell, 152 F.3d at 339. Thus, when confronted with a state court decision totally devoid of reasoning, a federal district court independently must determine whether the record reveals a constitutional violation. See id. Under those circumstances, de novo review is appropriate. [FN2]

> FN2. We note that in Davis v. Kramer, the California Court of Appeals supplied a decision, albeit unpublished, explaining why it was denying Davis's appeal. See 167 F.3d at 496. Thus, Davis presented different factual circumstances than are present here.

This approach is in consonance with the deference we have accorded state court findings of fact on habeas review. Although AEDPA requires federal courts to defer to reasonable state court factual findings, we have, in a number of cases in which the state court did not make findings of fact, granted less deference to the state court decision. See Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir.1997) (holding that when a state court has made no findings of fact, "the district court's duty to ascertain the sufficiency of the evidence by engaging in a thorough review of the complete state court record is unaffected by the AEDPA"); Jeffries, 114 F.3d at 1500 (stating that when reviewing a state court's factual determinations, a "responsible, thoughtful answer reached after a full opportunity to litigate is adequate to support the judgment") (citations and internal quotation marks omitted); Baylor v. Estelle, 94 F.3d 1321, 1325 (9th Cir.1996) (stating that the district court's evidentiary hearing was the first chance that the petitioner had to develop the factual basis of his claim and therefore finding that it would be inappropriate to disregard the facts developed in the district court even in the light of AEDPA), cert. denied, 520 U.S. 1151, 117 S.Ct. 1329, 137 L.Ed.2d 489 (1997).

In this case, the California Court of Appeals affirmed Delgado's conviction without opinion. The court made no factual findings nor drew any conclusions of law. The Supreme Court of California summarily denied review. Six months later, the Supreme Court of California denied Delgado's petition for habeas relief, again without explanation. Such a perfunctory review, often euphemistically described as a "postcard denial," does not warrant the deference we might usually apply. Absent a reasoned explanation, federal courts are left simply to speculate about what "clearly established law" the state court might have applied, as well as how it was applied.

Under these circumstances, *1153 meaningful consideration of the state court's reasoning on federal habeas review is not possible. Thus, the district court properly deduced that it was left with no alternative but to review independently the claims in the petition.

IV

A

[4][5] After conducting an independent analysis, the district court correctly concluded that Delgado had been denied his Sixth Amendment right to effective assistance of appellate counsel under Strickland v. Washington, which is "clearly established law" for the purposes of AEDPA. See Jones, 114 F.3d at 1013. The district court properly determined that Delgado's appellate counsel was ineffective because he failed to raise any arguable issues in the appellate brief in violation of the procedure announced in Anders v. California.

[6][7] Under clearly established law, all criminal defendants have a right to an advocate in mandatory appeals. See Douglas v. California, 372 U.S. 353, 355-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Appellate counsel has an ethical responsibility of constitutional dimension to argue zealously those issues that counsel finds not wholly frivolous. See Anders, 386 U.S. at 744, 87 S.Ct. 1396. When an attorney believes an appeal would violate his or her ethical duty to refrain from making frivolous arguments, Anders requires counsel to "advise the court and request permission to withdraw." Id. A request to withdraw, "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. The attorney must send the brief to the defendant and the defendant must be informed of his or her right to file a supplemental brief. See id.

[8] The reviewing court then must make a full examination of all of the proceedings to determine if the appeal is in fact wholly frivolous. See id. If the court finds the appeal to be frivolous, the court may permit counsel to withdraw. See id. If the court finds any arguable issues, it must appoint counsel for the defendant. See id. The reason for this exacting procedure is to ensure that indigent defendants receive the same legal assistance that nonindigent defendants receive. See id. at 745. In addition, the brief containing "ready references" to arguable issues assists the court in its vigorous review, rather than presenting the court with a cold record. See id.

These mandates were violated in this case. The appellate brief filed on Delgado's behalf "failed to draw attention to 'anything in the record that might arguably support the appeal' "--a failure that left Delgado constructively without counsel on appeal. Penson v. Ohio, 488 U.S. 75, 81, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988) (quoting Anders, 386 U.S. at 744, 87 S.Ct. 1396). In addition, counsel did not file a motion to withdraw as required by Anders. See 386 U.S. at 744, 87 S.Ct. 1396. Thus, Delgado's appellate counsel rendered constitutionally deficient representation within the meaning of Strickland. See Davis, 167 F.3d at 496-98 (applying AEDPA to an identical challenge under Strickland and Anders and determining that the Supreme Court in Anders clearly established that appellate counsel must raise arguable issues in an Anders brief).

[9] Contrary to the Deputy Warden's contention, AEDPA does not preclude the district court's application of Anders to invalidate California's no-merit brief procedure approved in People v. Wende, 25 Cal.3d 436, 158 Cal.Rptr. 839, 600 P.2d 1071 (1979). In Davis, we examined the interplay between Anders and the California

no-merit brief procedure approved in Wende, and concluded that the Wende procedure did not comport with the constitutional requirements of Anders. See 167 F.3d at 498-99; see also Robbins v. Smith, 152 F.3d 1062, 1068 (9th Cir.1997) (holding that, for retroactivity purposes in a case in which appellate counsel had filed a Wende brief, "[a]pplication of Anders ... required no extension of precedent or logical interpolation. The facts of Robbins's case almost directly mirror those of Anders. Accordingly, no 'new' constitutional rule was invoked in this case"), petition for cert. filed, 67 U.S.L.W. 3437 (U.S. Dec. 17, 1998) (No. 98-1037). Likewise, in this case we have *1154 applied existing Supreme Court precedent to reach our decision, a methodology consistent with AEDPA.

Further, AEDPA does not "compel" federal courts to turn an amaurotic eye to state court proceedings, nor to rubberstamp state court interpretation of federal law. Indeed, true cooperative federalism, as well as AEDPA, demands a more nuanced approach. In this case, the results hardly could be more plain. Anders has been clearly established law of the United States Supreme Court for more than thirty years. As Chief Judge Hug determined, Wende procedures do not comport with the "very low threshold" established by the Supreme Court in Anders. See Robbins, 152 F.3d at 1067-68. And as the Davis court held, nothing in AEDPA alters that assessment. See 167 F.3d at 498.

On the face of this record, Delgado's appellate counsel failed to satisfy Anders by first refusing to identify any appellate issues, despite the prior listing of potential issues by trial counsel, and by then neglecting to seek to withdraw as counsel. These errors rendered appellate counsel's performance constitutionally deficient under the

Sixth Amendment. See Strickland, 466 U.S. at 687-91, 104 S.Ct. 2052; Davis, 167 F.3d at 498.

B

[10] The district court properly held that under Strickland, Delgado did not need to show prejudice because the failure of his counsel to raise arguable issues in the appellate brief creates a presumption of prejudice. See Penson, 488 U.S. at 86, 109 S.Ct. 346; Davis, 167 F.3d at 499-500. As the Supreme Court explained in Penson, when appellate counsel's only action is to file a motion to withdraw that raises no arguably appealable issues, a petitioner is "completely without representation during the appellate court's actual decisional process." 488 U.S. at 88, 109 S.Ct. 346. Merely filing a no-merit brief similarly leaves a petitioner without representation on appeal. This situation differs radically from the case "in which counsel fails to press a particular argument." Id. Thus, when counsel fails to raise any arguable issues in the appellate brief, it is "inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman[v. State of Cal., 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)]." Id. at 88-89, 109 S.Ct. 346; see also Lofton v. Whitley, 905 F.2d 885, 887-88 (5th Cir.1990) (presuming prejudice when counsel failed both to raise arguable issues in the appellate brief and ask for leave to withdraw).

The wisdom of this rule is amply demonstrated in this case. Throughout his journey in the criminal justice system, Delgado had hardly any assistance, much less effective assistance, of appointed counsel. His appointed trial counsel, who purportedly met with Delgado on only three occasions, was absent from almost all of the court proceedings. Instead, Delgado received his advice and representation from attorneys for his codefendants who,

although no doubt well- meaning, had other priorities and inherent conflicts of interest in this multi- defendant drug conspiracy case-a case in which even the judge noted the "finger-pointing" among codefendants. No one submitted any evidence or even argument for mitigation of his sentence, although factors that might have supported a reduction existed.

Although trial counsel's ineffective assistance presented a legitimate, specific, and compelling appellate issue, it was never developed or presented by counsel. Even after specific appellate issues were identified in the certificate for probable cause, Delgado's appointed appellate counsel ignored them, simply choosing to inform the court that there were no arguable issues. When appellate counsel deliberately elected to ignore the requirements of Anders, he completely deprived Delgado of the right to counsel on appeal. Thus, the district court appropriately held that Delgado's Sixth Amendment rights had been violated.

C

The absence of any meaningful legal assistance in this case makes a mockery of the representation of indigent defendants contemplated by the Supreme Court in Anders, Penson, Strickland, and Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Clearly established constitutional *1155 law requires competent advocacy in criminal defense, not shadowboxing. To hold otherwise would, to paraphrase Eliot, render the clear sound of Gideon 's trumpet quiet and meaningless as wind in dry grass.

We affirm the judgment of the district court.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,

Petitioner,

v.

GAIL LEWIS, WARDEN, et al.,

Respondents.

Case No.: CV 96-7241-R (RNB)

JUDGMENT

Pursuant to the Order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The Petition for Writ of Habeas Corpus is conditionally granted. Respondents shall discharge Petitioner from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal and provides petitioner with new appointed counsel within sixty (60) days of the entry of Judgment herein.

DATED: June 30, 1997

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,
Petitioner

v.

GAIL LEWIS, WARDEN, et al.,
Respondents.

Case No.: CV 96-7241-R (RNB)

ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the pleadings and papers herein, including the Final Report and Recommendation and the Report and Recommendation of United States Magistrate Judge. Objections to the Report and Recommendation have been filed herein. Having made a de novo determination of those portions of the Report and Recommendation to which objection has been made, the Court concurs with and adopts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that a conditional writ of habeas corpus be granted to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal and provides petitioner with new

appointed counsel within 60 days of the entry of Judgment herein.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Final Report and Recommendation and the Judgment by United States mail on Petitioner and counsel for Respondents.

DATED: June 30, 1997

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS GARCIA DELGADO,
Petitioner

v.

GAIL LEWIS, WARDEN, et al.,
Respondents.

Case No.: CV 96-7241-R (RNB)

FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to the provisions of 28 U.S.C. ~ 636 and General Order 194 of the United States Distr'ict Court for the Central District of California.

On May 28, 1997, the Clerk filed Notice of Filing of Magistrate Judge's Report and Recommendation and Lodging of Proposed Judgment, which was served on the parties together with copies of said Report and Recommendation ("R&R"). Respondents have timely filed objections to the Report and Recommendation.

Having carefully read and considered respondents' objections, the Court finds no good reason set forth for changing or modifying the recommendation in any respect.

The Court will set forth and address each of the objections in turn.

I: "This Court should not address whether Wende comports with Anders, because petitioner has not exhausted this claim."

In this section of their objections, respondents merely have repackaged and restated arguments already made by them in their Supplemental Answer. (Compare Objections at 6-8 with Supplemental Answer at 5-6). The Court already has considered, addressed and rejected these arguments. As noted in the Report and Recommendation, in his California Supreme Court habeas petition, petitioner claimed that both his counsel (i.e., his counsel at the trial level and his counsel on appeal) had violated his federal and state constitutional rights to effective assistance of counsel. In support of this claim, petitioner alleged in substance that he had apprised his appellate counsel of the bases for his contentions that his guilty plea had not been knowing or voluntary and that his conviction and sentence had been the product of ineffective assistance of trial counsel; that appellate counsel had refused to raise what petitioner had believed was the arguable issue of ineffective assistance of trial counsel; and that appellate counsel instead had filed a Wende brief without even providing petitioner with a copy of the appellate record. (See Ans. Exh. 6 at 52-53).

Thus, the claim raised by petitioner to the California Supreme Court, insofar as it pertained to appellate counsel, was the same claim as that being raised by petitioner herein. Indeed, in their original Answer, respondents acknowledged that petitioner had exhausted his state remedies. (See Ans. at 2). In now contending that "petitioner never presented to the California Supreme Court a claim that the Wende brief filed by his appellate

counsel in the California Court of Appeal failed to comply with the requirements of Anders," respondents are confusing what the Court characterized in its Order re Further Proceedings as the real issue raised by petitioner's ineffective assistance of appellate counsel claim (which the Court noted respondents had failed to address), and the claim itself. Petitioner's ineffective assistance of appellate counsel claim clearly has been exhausted.

II: "The Teague doctrine survives the Antiterrorism and Effective Death Penalty Act."

This objection stems from a mischaracterization by respondents of the Report and Recommendation. The Court merely observed that by imposing a strict choice-of-law denied, 115 S. Ct. 1359 (1995); Chambers v. United States, 22 F.3d 939, 942 (9th Cir. 1994)("We do not create a new rule when we simply apply 'a rule of this general application,' [citation omitted] to a new set of facts."), vacated on other grds, 47 F.3d 1015 (9th Cir. 1995); Beam v. Paskett, 3 F.3d 1301, 1310 (9th Cir. 1993)(noting that "a rule is not 'new' simply because it is applied to a set of different facts"), cert. denied, 511 U.S. 1060 (1994). Nowhere in their objections do respondents address this proposition or the authorities cited by the Court for it.

As noted in the Report and Recommendation, petitioner's conviction here became final in June, 1996, twelve years after the Supreme Court had articulated in Strickland the standard for determining effective assistance of counsel; twenty-nine years after the Supreme Court had articulated in Anders what the obligations of appellate counsel are; and eight years after the Supreme Court had revisited Anders in McCoy and Penson, and explained how Strickland is to be applied to claims of ineffective assistance of appellate counsel. The Court also

notes that petitioner's conviction became final over six years after the Ninth Circuit held in United States v. Griffy, 895 F.2d 561, 562 (9th Cir. 1990), that the requirements imposed by the California Supreme Court in Wende did not satisfy the requirements imposed by the United States Supreme Court in Anders and McCoy. Thus, this is not an instance of the state being unaware of a new constitutional rule of criminal procedure at the time petitioner's conviction became final, or of the Court applying a new constitutional rule of criminal procedure, or of the Court extending or modifying settled constitutional principles. Rather, this merely is an instance of the Court applying settled constitutional principles to a particular set of facts, and Teague is not implicated.

III: "A holding that a Wende brief does not meet the requirements of Griffy would be a 'new rule' of criminal procedure under Teague, and thus cannot be applied in this habeas proceeding."

In this section of their objections, respondents merely have repeated verbatim the same arguments already made by them in their Supplemental Answer. (Compare Objections at 11-15 with Supplemental Answer at 17-20). The Court already has considered, addressed and rejected these arguments. As noted in the Report and Recommendation and reiterated above, Teague is not implicated when the petitioner merely is seeking application of an, existing normative rule to a new set of facts. Nowhere in their objections do respondents address this proposition or the authorities cited by the Court for it.

IV: "The Antiterrorism and Effective Death Penalty Act requires this Court to uphold the California Supreme Court's merits denial of petitioner's claims."

Preliminarily, the Court will address respondents' contention that, for purposes of application of the new standard of review, they are relying upon both the California Court of Appeal decision (on direct appeal) and the California Supreme Court decision (denying petitioner's habeas petition). (See Objections at 16). Under the new standard of review, a habeas petition may not be granted "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. S 2254(d). Thus, it is manifest that the new standard of review only applies to decisions adjudicating claims on the merits. Since the only filing in which petitioner raised an ineffective assistance of appellate counsel claim was his California Supreme Court habeas petition, it is nonsensical for respondents to contend that, for purposes of applying the new standard of review, they also are relying on a decision by the California Court of Appeal which did not even purport to adjudicate petitioner's ineffective assistance of appellate counsel claim.

Respondents' remaining arguments in this section of their objections are the same arguments already raised by them in their Supplemental Answer. (Compare Objections at 17-20 with Supplemental Answer at 7-9).

The Court already has considered, addressed and rejected these arguments.

Indeed, the Ninth Circuit's recent decision in Jones v. Wood, 1997 WL 312584 (9th Cir.), is completely dispositive of respondents' contention that the Court did not accord sufficient deference to the California Supreme Court's summary denial of petitioner's habeas petition containing his ineffective assistance of appellate counsel claim. In Jones, the Ninth Circuit held that petitioner was entitled to an evidentiary hearing on his ineffective assistance of counsel claims based on the alleged failure to investigate, because his allegations if proven would satisfy both prongs of Strickland under the de novo standard of review which the Ninth Circuit noted applied to ineffective assistance of counsel claims. See 1997 WL 312584, at *8. Further, the Ninth Circuit held that "[a]pplication of the AEDPA in this case would neither affect the appropriatene.ss of an evidentiary hearing before the district court nor preclude habeas relief on the merits of Jones' claims." Id. at *12. As the Court explained, "The facts developed in the course of the evidentiary hearing, in turn, would enable the district court to determine whether Jones qualifies for habeas relief under the AEDPA on the ground that the state courts' denial of his petition was contrary to clearly established law as announced by the Supreme Court--in this case, the requirement of effective assistance of counsel as announced in Strickland." Id.

Thus, the approach taken in the Report and Recommendation with respect to petitioner's ineffective assistance of appellate counsel claim appears to be mandated by Jones. It also is consistent with the approach espoused by the Ninth Circuit in Baylor v. Estelle, 94 F.3d 1321 (9th Cir. 1996), cert. denied, 117 S. Ct. 1329 (1997), which the Court cited in the Report and

Recommendation and which respondents have neglected to address in their objections. In Baylor, after engaging in de novo review of petitioner's ineffective assistance of counsel claim and concluding that petitioner had received ineffective assistance of counsel, the Ninth Circuit further concluded that its decision would be the same whether or not the new Act applied because the state court decision was contrary to clearly established federal law determined by the Supreme Court in Strickland. See 94 F.3d at 1325.

V: "California's Wende procedure comports with Anders."

In this section of their objections, respondents again merely have repeated verbatim arguments from their Supplemental Answer. (Compare Objections at 21-28 with Supplemental Answer at 10-16). The Court already has considered and rejected respondents' proffered construction of the Supreme Court's holdings in Anders, McCoy and Penson. Likewise, the Court~ already has considered and rejected respondents' attempt to trivialize and minimize the significance of the Ninth Circuit's construction of Anders and McCoy in Griffy.

VI: "Penson did not establish a rule of presumed prejudice."

In this section of respondents' objections, respondents again merely have repeated verbatim arguments made by them in their Supplemental Answer. (Compare Objections at 29 with Supplemental Answer at 21).

As discussed in the Report and Recommendation, the Supreme Court held in Penson that it was inappropriate to apply either the prejudice requirement of Strickland or the harmless error analysis of Chapman v.

California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), where the brief filed by appellate counsel failed to comply with the requirements of Anders. As the Supreme Court observed:

> "Finding harmless error or a lack of Strickland prejudice in cases such as this . . . would leave indigent criminal appellants without any of the protections afforded by Anders. Under the State's theory, if on reviewing the bare appellate record a court would ultimately conclude that the conviction should not be reversed, then the indigent criminal appellant suffers no prejudice by being denied his right to counsel. Similarly, however, if on reviewing the record the court would find a basis for reversal, then the criminal defendant also suffers no prejudice. In either event, the criminal appellant is not harmed and thus has no basis for complaint. Thus, adopting the State's view would render meaningless the protections afforded by Douglas and Anders." 488 U.S. at 86.

Rather, the Supreme Court held that prejudice must be presumed where there has been an actual or constructive denial of the assistance of appellate counsel. See 488 U.S. at 88-89.

In this section of their objections, respondents contend that Penson is distinguishable from this case, because petitioner's appellate counsel did not actually withdraw as petitioner's counsel of record. However, as discussed in the Report and Recommendation, the fact that appellate counsel did not formally withdraw does not render his ineffective assistance any less prejudicial. See Lofton v. Whitley, 905 F.2d 885, 888 (5th Cir. 1990)(holding that the failure to raise any grounds for appeal was the equivalent of withdrawal, for purposes of

applying Anders and Penson); see also Fern v. Gramley, 99 F.3d 255, 259 (7th Cir. 1996)(rejecting the state's attempt to distinguish Penson on the ground that counsel had been totally absent there; "[W]e confess that the difference between counsel who leaves the courtroom and counsel who effectively shuts the courtroom door to a client continues to elude us."). Nor does the fact that, in denying the Petition for Review, the California Supreme Court already has denied petitioner's ineffective assistance of trial counsel claim render appellate counsel's ineffective assistance any less prejudicial. As the Eighth Circuit held in Evans v. Clarke, 868 F.2d 267, 270 (Sth Cir. 1989), the state Supreme Court's consideration of petitioner's claims after he raised them pro se in a post-conviction proceeding "cannot be an adequate substitute or proxy for what Anders and Penson guarantee -- decision on appeal of all arguable issues only after fully adversarial briefing."

VII: "The California Court of Appeal and California Supreme Court properly found there were no nonfrivolous issues to raise on direct appeal."

In this final section of their objections, respondents again have repeated verbatim arguments from their Supplemental Answer. (Compare Objections at 30-32 with Supplemental Answer at 22-23).

As discussed in the Report and Recommendation, under Anders and McCoy, appellate counsel is required to "submit a brief on behalf of the indigent defendant presenting the strongest arguments in favor of their client supported by citations to the record and to applicable legal authority." United States v. Griffy, 895 F.2d 561, 563 (9th Cir. 1990). This appellate counsel simply failed to do here.

The Court identified two arguable issues in the Report and Recommendation which petitioner's appellate counsel could have identified and briefed. In their objections, respondents have failed to address the basis for the Court's conclusion that petitioner's appellate counsel could have identified and briefed petitioner's claim that trial counsel rendered ineffective assistance of counsel. The Court's conclusion was based inter alia on the failure of trial counsel to appear at the sentencing hearing, and trial counsel's relegating petitioner to representation by a codefendant's counsel who seemingly had a conflict of interest and who proceeded to submit without making a single argument on petitioner's behalf for a lesser sentence. Likewise, respondents have failed to address the basis for the Court's conclusion that petitioner's appellate counsel could have identified and briefed the claim that petitioner's guilty plea was not knowing and voluntary. As noted in the Report and Recommendation, this was the very issue raised by petitioner in his request for certificate of probable cause, which by granting the trial court was certifying was not totally frivolous. See Cal. Penal Code § 1237.5; People v. Ribero, 4 Cal. 3d 55, 62, 480 P.2d 308, 92 Cal. Rptr. 692 (1971).

RECOMMENDATION

For all of the foregoing reasons, IT IS THE MAGISTRATE JUDGE'S FINAL RECOMMENDATION that the District Court issue an Order: (1) approving and adopting the Magistrate Judge's initial Report and Recommendation and this Final Report and Recommendation; and (2) directing that Judgment be entered granting a conditional writ of habeas corpus, to the extent that petitioner shall be discharged from custody on the subject conviction unless the California Court of Appeal accepts jurisdiction over petitioner's direct appeal

and provides petitioner with new appointed counsel within 60 days of the entry of Judgment herein.

DATED: June 26, 1997

ROBERT N. BLOCK
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

Fourth Appellate District, Division Two, No. E016476

S051515

IN THE SUPREME COURT OF CALIFORNIA

==========

THE PEOPLE, Respondent

v.

JESUS GARCIA DELGADO, Appellant

==========

Appellant's petition for review DENIED.

/s/ LUCAS
Chief Justice

ORDER DENYING WRIT OF HABEAS CORPUS

No. S053431

IN THE SUPREME COURT OF CALIFORNIA

==========

IN RE JESUS GARCIA DELGADO

ON

HABEAS CORPUS

==========

Petition for writ of habeas corpus DENIED.

/s/ George
Chief Justice

APPENDIX E

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

THE PEOPLE,
Plaintiff and Respondent,

v.

JESUS GARCIA DELGADO,
Defendant and Appellant.

E016476
(Super. Ct. No. FSB 5856)

[UNPUBLISHED OPINION]
Filed December 18, 1995

APPEAL from the Superior Court of San Bernardino County. Patrick J. Morris, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On November 23, 1994, the defendant was charged by an information the following counts in violation of the Health and Safety Code:[1] Count 1, manufacturing methamphetamine (§ 11379.6); count 2,

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1. All statutory references are to the Health and Safety Code unless otherwise indicated.

possession of ephedrine (§ 11383); and count 3, possession of methamphetamine for sale (§ 11378). The following enhancements were attached: To count 1, the amount involved was in excess of 10 pounds by weight (§ 11379.8, subd. (a)), it involved proximity to a school (§ 11353.6, subd. (b)), and it involved more than 400 liters of methamphetamine (§ 11370.4, subd. (b)); to count 3, the amount was in excess of 400 liters by volume (§ 11370.4, subd. (b)) and in excess of 10 kilograms by weight (§ 11370.4, subd. (b)), and involved proximity to a school (§ 11353.6, subd. (b)).

On March 3, 1995, pursuant to Penal Code section 1192.7, the defendant, represented by counsel, pled guilty to counts 1, 2 and 3 and admitted the allegations filed pursuant to §§ 11379.8, subdivision (a) and 11370.4, subdivision (b), and in accordance with the negotiated disposition he was committed to state prison for 15 years, less custody credits, and the remaining allegations were dismissed on motion of the People. (Pen. Code, § 1385.)

Defendant appealed and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436, setting forth a statement of the case, a summary of the facts, and requesting this court to undertake a review of the entire record.

The defendant filed a personal supplemental brief which has been read and considered by this court.

We have now concluded our independent review of the record and find no arguable issues.

The judgment is affirmed.

NOT FOR PUBLICATION

/s/RAMIREZ
P.J.

We concur:
/s/RICHLI
J.

/s/McDANIEL
J.*

* Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JESUS GARCIA DELGADO,
Petitioner-Appellee,

v.

GAIL LEWIS, Deputy Warden; Attorney General of the State of California,
Respondents-Appellants.

No. 97-56162
D.C. No. CV-96-07241-R

ORDER
Filed July 12, 1999

Before: PREGERSON, D. NELSON and THOMAS, Circuit Judges.

Appellant Lewis has moved for a stay of the issuance of the mandate pursuant to Federal Rule of Appellant Procedure 41(b). Pursuant to the motion, issuance of the mandate is stayed until August 16, 1999.

APPENDIX G

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JESUS GARCIA DELGADO,
Defendant and Appellant.

Case No. E-016476
Superior Court No.
FSB 5856
(SAN BERNARDINO COUNTY)

ON APPEAL FROM THE SUPERIOR COURT, SAN BERNARDINO COUNTY HONORABLE PATRICK MORRIS, JUDGE

OPENING BRIEF OF APPELLANT, REQUEST FOR INDEPENDENT REVIEW OF THE RECORD AND DECLARATION IN SUPPORT THEREOF

CHRISTOPHER BLAKE, #53174
4455 Lamont Street, #B
San Diego, California 92109
(619) 274-1772
Attorney for Appellant
(Under Appointment by the
Court of Appeal Appellate
Defenders Independent
Case System)

TOPICAL INDEX

	PAGE
TABLE OF AUTHORITIES	ii
I - STATEMENT OF THE CASE	1
II - STATEMENT OF THE EVIDENCE	4
REQUEST OF APPELLATE COUNSEL, CHRISTOPHER BLAKE FOR THIS COURT TO UNDERTAKE AN INDEPENDENT REVIEW OF THE RECORD ON APPEAL	5
DECLARATION OF CHRISTOPHER BLAKE IN SUPPORT OF REQUEST FOR INDEPENDENT JUDICIAL REVIEW OF APPELLATE RECORD	8
PROOF OF SERVICE	10

TABLE OF AUTHORITIES

CASES	PAGE
Anders v. California (1967) 386 U.S. 738	5
Auto Equity Sales v. Superior Court (1962) 57 Cal.2d 450	7
In Re Angela G. (1995) 33 Cal.App.4th 398	7
In Re Nash (1964) 61 Cal.2d 491	5
In Re Sade C. (1995) Cal.App.4th, 95 Daily Journal D.A.R. 10884	7
People v. Feggans (1967) 67 Cal.2d 444	5
People v. Hackett (1995) Cal.App.4th, 95 Daily Journal D.A.R. 9692	7
People v. Johnson (1981) 123 Cal.App.3d 106	5, 8
People v. Wende (1979) 25 Cal.3d 436	5, 6
STATUTES	
Health and Safety Code § 11353.6(b)	

Health and Safety Code § 11370.4(b)(3)

Health and Safety Code § 11370.4(b)(4)

Health and Safety Code § 11378

Health and Safety Code § 11379.6

Health and Safety Code § 11379.8(a)(3)

Health and Safety Code § 11383

Penal Code § 1538.5

Penal Code § 995

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION TWO

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JESUS GARCIA DELGADO, Defendant and Appellant.**	**Case No. E-016476** **Superior Court No. FSB 5856 (SAN BERNARDINO COUNTY)**

ON APPEAL FROM THE SUPERIOR COURT, SAN BERNARDINO COUNTY

HONORABLE PATRICK MORRIS, JUDGE

OPENING BRIEF OF APPELLANT, REQUEST FOR INDEPENDENT REVIEW

OF THE RECORD AND DECLARATION IN SUPPORT THEREOF.

TO THE HONORABLE MANUAL A. RAMIREZ, PRESIDING JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO:

Appellant JESUS GARCIA DELGADO hereby submits the following as his opening brief in the above entitled matter:

I
STATEMENT OF THE CASE.

On November 23, 1994, a three count information was filed charging appellant and five others -- Juan Jose Cuevas, Jose Maria Cuevas, Efigenia Medrano, Carlos Angino and Enrique Galvan -- with operating a methamphetamine laboratory. Specifically, they were charged with violating Health and Safety Code sections 11379.6 (manufacturing methamphetamine - count 1), 11383 (possession of ephedrine - count 2) and 11378 (possession of methamphetamine for purposes of sale - count 3). (CT 23-27).[1]

Two enhancements were also attached to count 1, to wit, Health and Safety Code section 11379.8, subdivision (a), subsection (3), involving an amount in excess of 10 pounds by weight; Health and Safety Code section 11353.6, subdivision (b), involving proximity to a school. On count 3, the school enhancement was also alleged as well as Health and Safety Code section 11370.4, subdivision (b), subsection (4), involving an amount in excess of 400 liters by volume and Health and Safety Code section 11370.4, subdivision (b), subsection (3), involving

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1. "CT" refers to the Clerk's Transcripts; "RT" refers to the Reporter's Transcripts of the hearing on the change of plea and sentencing.

an amount in excess of 10 kilograms by weight.[2] (CT 23-27).

In a Penal Code section 995 motion, appellants successfully challenged the school proximity enhancement. (CT 94). Their motion under Penal Code section 1538.5 was not, however, successful. (CT 95). On March 3, 1995, all six entered into a plea bargain. Appellant, Juan Jose Cuevas and Angino pled to all charges and admitted all enhancements but would receive a maximum term of fifteen years in state prison although they might receive a lesser sentence.[3] (CT 99-101, RT 14-15). The other three could receive sentences of up to seven years. (RT 17-18).

As part of the entry of the plea, appellant specifically waived his right to appeal the results of motions "filed in the Superior Court." (CT 100). No further mention is made in the record that appellant had waived his rights to appeal the denial of the Penal Code section 1538.5 hearing except a vague reference to giving "up your right of appeal in this case." (RT 16).

Appellant was sentenced May 30, 1995, to fifteen years consisting of the middle term of five years on count 1 plus a 10 year enhancement for the quantity enhancement of section 11379.8, subdivision (a), subsection (3). The sentence on the remaining counts were ordered were stayed. (RT 44-45).

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2. The information did not list the subsections with the specificity of this brief, just the code section followed by the quantity. While not the ideal practice, it does past muster insofar and notifying appellant of the offenses.

3. Appellant did not admit a specific subdivision of either of the two enhancements but simply pied guilty to the relevant enhancement although the court did mention the amounts of the weights involved in each enhancement. (RT 22-23).

II
STATEMENT OF THE EVIDENCE

The preliminary hearing in this case showed that all six defendants were found on the premises of a house located at 6906 Little League Drive in the Devore area of San Bernardino when that house was raided as a suspected methamphetamine lab on October 13, 1994 at 6:30 a.m. (CT 36-37). Appellant was found hiding underneath the house while the others were inside it or attempting to leave it. (CT 39-41).

The house was permeated with the odor of methamphetamine being prepared. (CT 42). The drug was found in quantities sufficient to justify the weight/volume enhancements of the information. In addition, various ingredients used in the manufacturing process such as hydriotic acid, red phosphorus, ephedrine, nalgene and so on were found. (CT 47-50). Various paraphernalia such as scales, packing materials, tubes, vats and so on were also located in the house and garage. (CT 43). Approximately 35 pounds of methamphetamine was recovered and over 100 gallons of ephedrine. (CT 66, 73). Also found was a 9mm weapon.[4] (CT 56).

Additional details from the probation report showed that at least two minors were found on the premises as well. In addition, appellant was married to Ms. Medrano and was related to the two Cuevas as brother and nephew. (Prob. Rpt. 3-5).

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4. This formed the basis for a gun allegation against the two Cuevas and Ms. Medrano.

REQUEST OF APPELLATE COUNSEL, CHRISTOPHER BLAKE FOR THIS COURT TO UNDERTAKE AN INDEPENDENT REVIEW OF THE RECORD ON APPEAL.

Pursuant to the decision of the California Supreme Court in *People* v. *Wende* (1979) 25 Cal.3d 436, counsel for appellant respectfully requests this Court to conduct an independent review of the entire appellate record in order to determine for itself, whether the instant appeal contains any arguable appellate issues. By this request, however, counsel for appellant does not seek to be relieved as appellate counsel.

In *People* v. *Wende*, *supra*, the Court considered the obligations of appellate counsel and the reviewing court in preparing and ruling on an indigent appeal where counsel has been unable to discern any arguable issues. After reviewing the leading decisions of both the United States and California Supreme Courts [See *Anders v. California* (1967) 386 U.S. 738; *People v. Feggans* (1967) 67 Cal.2d 444; and *In Re Rash* (1964) 61 Cal.2d 491], the Court held that:

> ". . . *Anders* requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous. This obligation is triggered by the receipt of such a brief from counsel and does not depend on the subsequent receipt of a brief from the defendant personally." (*People* v. *Wende*, *supra*, at 441-442)

People v. Johnson (1981) 123 Cal.App.3d 106,

defined an arguable issue on appeal as follows:

> "We hold that an arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, must be meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential of success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*Id.*, at 109)

It is not necessary that appointed counsel request leave to withdraw from the case "so long as he has not described the appeal as frivolous and has informed the appellant that [s]he may request the court to have counsel relieved if [s]he so desires." (*People v. Wende, supra*, at 442; see Declaration of Christopher Blake, *infra*.)

Appellant is aware that several courts have questioned whether Wende remains good law and whether courts should continue follow it. (*People v. Hackett* (1995) __Cal.App.4th , 95 Daily Journal D.A.R. 9692 (July 20, 1995, as A-067229); *In Re Sade C.* (1995) Cal.App.4th , 95 Daily Journal D.A.R. 10884, fn. 18 (August 11, 1995, as B-082230). The obligation of appellate courts to conduct Wende reviews in non-criminal cases is now pending before the California Supreme Court in the case of *In Re Angela G.* (1995) 33 Cal.App.4th 398, Review granted June 15, 1995. Whether the Court will review *Wende* generally or just its application to non-criminal cases has yet to be determined. In any event, appellant will assume

that this court will continue to honor Wende unless and until the Supreme Court states otherwise. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455-456).

Dated:

_____
CHRISTOPHER BLAKE, #53174
Attorney for Appellant,
JESUS GARCIA DELGADO

DECLARATION OF CHRISTOPHER BLAKE IN SUPPORT OF REQUEST FOR INDEPENDENT JUDICIAL REVIEW OF APPELLATE RECORD

I, CHRISTOPHER BLAKE, declare under penalty of perjury as follows:

That I am the attorney appointed by this Court to represent appellant JESUS GARCIA DELGADO on his appeal following his commitment to state prison for fifteen years after his plea of guilty to three felony violations of the Health and Safety Code for manufacturing and possessing methamphetamine.

That I have read and reviewed the entire record on appeal, consisting of the Clerk's Transcripts (1 volume) and the Reporter's Transcripts (1 volume);

That I have been unable to ascertain from this record an arguable appellate issue within the meaning of *People v. Johnson, supra*;

That I have discussed the case with appellant by letter of this date, which was sent to him at his last known address, explaining my evaluation of the record on appeal, accompanied with a copy of the instant pleadings and informed him of his right to file a supplemental brief in his own behalf;

That I do not, at this time, move to withdraw as counsel of record for appellant and will continue to be available;

That I have advised appellant that he may request this Court to relieve me if he so desires;

Wherefore, I respectfully invoke the procedures adopted by the California Supreme Court in People v. Wende, supra, and request this Court to conduct an independent review of the entire appellate record to determine whether any arguable issues exist. Should this Court so determine, I will diligently and professionally argue such issues.

Executed at San Diego, California.

Dated: September 1, 1995

_____

CHRISTOPHER BLAKE, #53174
Attorney for Appellant,
JESUS GARCIA DELGADO

PROOF OF SERVICE

I, CHRISTOPHER BLAKE, declare:

I am a citizen of the United States, over 18 years of age, and not a party to this action. My business address is 4455 Lamont Street, #B, San Diego, California 92109. On this date, I served one copy of the attached document, to wit:

Appellant's Opening Brief

on each of the individuals below by placing in the course of Messenger Service, addressed as follows, or in the course of Delivery by United States Mail, first class postage, prepaid, as follows:

Clerk of the Court
Court of Appeal
Fourth Appellate District
Division Two
303 West Fifth St
San Bernardino, CA 92401

Distric Attorney
San Bernardino County
216 N. Mountain View Avenue
San Bernardino, CA 92415

Appellate Defenders, Inc.
233 A Street, Suite 1200
San Diego, CA 92101

Clerk of the Superior Court
351 North Arrowhead Drive
San Bernardino, CA 92415

Attorney General
110 West "A" Street
Suite 700
San Diego, CA 92101

Jesus Garcia Delgado, #J-64172
P.O. Box 8501
Coalinga, CA 93210

I declare under penalty of perjury the foregoing is true and correct.

Executed at San Diego, California.

Dated: September 5, 1995

/s/
CHRISTOPHER BLAKE